

Fordham Law School

## FLASH: The Fordham Law Archive of Scholarship and History

---

Faculty Scholarship

---

2008

# Property and Relative Status

Nestor M. Davidson

*Fordham University School of Law*, [ndavidson@law.fordham.edu](mailto:ndavidson@law.fordham.edu)

Follow this and additional works at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship](http://ir.lawnet.fordham.edu/faculty_scholarship)



Part of the [Property Law and Real Estate Commons](#)

---

### Recommended Citation

Nestor M. Davidson, *Property and Relative Status*, 107 Mich. L. Rev. 757 (2008-2009)

Available at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship/161](http://ir.lawnet.fordham.edu/faculty_scholarship/161)

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# PROPERTY AND RELATIVE STATUS

Nestor M. Davidson\*

*Property does many things—it incentivizes productive activity, facilitates exchange, forms an integral part of individual identity, and shapes communities. But property does something equally fundamental: it communicates. And perhaps the most ubiquitous and important messages that property communicates have to do with relative status, with the material world defining and reinforcing a variety of economic, social, and cultural hierarchies.*

*This status-signaling function of property—with property serving as an important locus for symbolic meaning through which people compare themselves to others—complicates premises underlying central discourses in contemporary property theory. In particular, status signaling can skew property’s incentive and allocative benefits, leading people to over-invest in status-enhancing property and undermining welfare gains associated with trades around property. Similarly, status signaling risks warping the link between property and personhood, investing that connection with a potentially dysfunctional regard for the property of others. And status signaling is magnified by and can undermine property’s communitarian links.*

*From a doctrinal perspective, ground-level property law intersects with the problem of relative status across an array of areas of intellectual property, real property, and personal property. At times law gives formal sanction to property’s hierarchical signaling and at times it tempers this tendency, breaking up fixed hierarchies. Sensitivity to these dynamics holds important lessons for both the ongoing development of property law and for the continuing interdisciplinary exploration of this core aspect of property.*

## TABLE OF CONTENTS

|  |     |
|--|-----|
| INTRODUCTION: THE FIRST EFFECTS OF PROPERTY .....              | 759 |
| I. FUNCTIONAL DISCOURSES IN CONTEMPORARY PROPERTY THEORY ..... | 765 |

---

\* Associate Professor, University of Colorado Law School. For helpful comments and discussion on earlier drafts of this Article, I am grateful to Ben Barros, Avi Bell, Jeremy Blumenthal, Peter Byrne, Kristen Carpenter, Eric Claeys, Rashmi Dyal-Chand, Lee Fennell, Liz Glazer, Clare Huntington, Gregg Kettles, Daphna Lewinsohn-Zamir, Joe Singer, Stephanie Stern, and Phil Weiser. Earlier versions of this Article were presented at the Law and Society 2008 Annual Conference and at the 2008 Property Works in Progress Conference.

|            |   |     |
|------------|---|-----|
| A.         | <i>Property as a Response to Scarcity: Of Incentives and Allocation</i> .....                                   | 765 |
| B.         | <i>Property and the Extended Self: Autonomy and Personhood in the Material World</i> .....                      | 768 |
| C.         | <i>Property, Community, and Social Relations</i> .....  | 771 |
| II.        | THEORIES OF PROPERTY AND STATUS SIGNALING .....   | 773 |
| A.         | <i>Comparative Status in the Intellectual History of Property</i> .....   | 774 |
| B.         | <i>Contemporary Perspectives on Status Signaling, Hierarchy, and Property</i> .....                             | 778 |
| 1.         | <i>Property as Communication</i> .....  | 779 |
| 2.         | <i>Development of Self by Reference to Others</i> .....   | 782 |
| 3.         | <i>Positional Goods and the Economics of Status Races</i> .....   | 785 |
| C.         | <i>Synthesis and Reflections</i> .....  | 787 |
| 1.         | <i>The Boundaries of Status Signaling Through Property</i> .....  | 787 |
| 2.         | <i>Notes of Caution and Some Responses</i> .....  | 791 |
| III.       | STATUS COMPARISON AS CRITIQUE IN PROPERTY THEORY.....   | 794 |
| A.         | <i>Over-Incentivizing, Misallocation, and Status Races</i> .....  | 795 |
| B.         | <i>A Fun-House Mirror for the Looking-Glass Self: Warping Identity and Personhood</i> .....                     | 798 |
| C.         | <i>Reinforcing Hierarchy in Property's Communitarian Web</i> .....  | 800 |
| D.         | <i>Status Signaling as a Theoretical Bridge</i> .....   | 801 |
| IV.        | LEVELING AS A NORMATIVE FRAME FOR PROPERTY DOCTRINE?.....   | 802 |
| A.         | <i>Property Law's Status-Reinforcing Tendencies</i> .....   | 803 |
| 1.         | <i>Intellectual Property: Protecting the Value of Status Symbolism</i> .....                                    | 803 |
| 2.         | <i>Land Use and Real Property: The Place and Physical Form of Status</i> .....                                  | 805 |
| 3.         | <i>Property-Related Debt as Fuel for Status Races</i> .....   | 807 |
| B.         | <i>Status Mobility in Property Law: Ambiguities and Anxieties</i> .....   | 807 |
| 1.         | <i>Rethinking Alienability</i> . . . ..   | 808 |
| 2.         | <i>. . . And Inalienability</i> .....   | 809 |
| 3.         | <i>Susette Kelo's Anxiety: Eminent Domain and the Loss of Relative Status</i> .....                             | 810 |
| 4.         | <i>Status Ambiguity in Other Doctrinal Contexts</i> .....   | 811 |
| C.         | <i>Tempering Influences: Taxation, Information, and Property Law as Comparative Regulatory Strategies</i> ..... | 812 |
| CONCLUSION | .....   | 816 |

*Insatiable ambition, the thirst of raising their respective fortunes, not so much from real want as from the desire to surpass others, inspired all men with a vile propensity to injure one another, and with a secret jealousy, which is the more dangerous, as it puts on the mask of benevolence, to carry its point with greater security. In a word, there arose rivalry and competition on the one hand, and conflicting interests on the other, together with a secret desire on both of profiting at the expense of others. All these evils were the first effects of property, and the inseparable attendants of growing inequality.*

—Jean-Jacques Rousseau<sup>1</sup>

## INTRODUCTION: THE FIRST EFFECTS OF PROPERTY

The iPod Nano comes in several colors, which for a time included dull industrial silver, as well as bright blue, green, pink, jet black, and red. Savvy iPod owners understood at a glance that these colors corresponded to amounts of memory—the black Nano, for example, having twice or four times as much as the silver—and, not surprisingly, to how much each model cost.

Suburban communities have long regulated land use to privilege single-family housing, typically with large minimum lot sizes, generous setbacks, and extensive floor-area requirements. Although this tends to generate an affluent homogeneity decried by planners and scholars, people are increasingly willing to take on unsustainable levels of debt and commute distances that would once have seemed unthinkable to be able to say that they live in such communities.

What do iPod colors and homes in far-flung, exclusionary suburbs have in common? Each is an example of the ubiquitous role that property plays in signaling relative status.<sup>2</sup> Despite a wonderful flowering of theoretical and empirical property literature in recent years, legal scholars have largely ignored this critical aspect of property. This Article accordingly brings to the fore status signaling through property, exploring its implications for contemporary property theory, and explaining the underappreciated role that the design and operation of property law plays in both reinforcing and undermining property's hierarchical signaling tendencies.

To understand these dynamics, begin with the proposition that property operates on several levels at once. On one level, property serves basic

1. JEAN-JACQUES ROUSSEAU, ON THE ORIGIN OF INEQUALITY 73–74 (G.D.H. Cole trans., Cosimo Classics 2005) (1755).

2. Status is a notoriously expansive term, so it bears a moment to clarify at the outset how this Article employs it. Status in ordinary usage can simply, and neutrally, mean state or condition. Henry Maine, by contrast, famously associated status with the concept of a rigid place in society and the legal order, from which Western society has supposedly experienced progressive movement to “free agreement” as the basis for social relations. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 163–65 (photo. reprint 2007) (Frederick Pollock, ed., 10th ed., Henry Holt & Co. 1906). This Article, however, deploys status in a third sense—status as relative rank or position. For convenience, then, the Article will generally use “status” as a shorthand for this idea of comparative status.

functions that are so familiar that we rarely pause to take note. Money enables exchange and investment; food provides sustenance; books entertain and inform; buildings shelter a myriad of significant and trivial aspects of life; and so forth. But all of these things—indeed all property, tangible and intangible—work in other ways at the same time. Property forms an underlying and important aspect of the self, helping to shape personality and individual autonomy. On yet another level, property serves as the connective tissue for communities, defining mutual obligations and setting the boundaries of social relations. All of this is well recognized and the bulk of our contemporary thinking about property falls roughly along these lines.<sup>3</sup>

Property, however, does something else equally fundamental: it *communicates*.<sup>4</sup> In particularly potent ways, what we possess broadcasts information about who we are and, most importantly, who we are in relation to one another.<sup>5</sup> Most people are quite adept at sending and deciphering these signals, which can vary across cultures and contexts, often shifting rapidly in their significance and particular meaning. Thus, beyond practicality, personhood, and community, property plays an overarching role in shaping and reinforcing economic, social, and cultural hierarchies. Jet black iPods and exurban McMansions might be great for playing music and keeping the rain out at night. They might also help us remember songs that are particularly meaningful in our family or play out the rituals of our neighborhood's daily life. But a large part of *why* these things exist in the particular way they do—and the value we place on them—comes from the status they are commonly understood to confer.<sup>6</sup>

This status signaling relates to but is ultimately distinct from the underlying material differences property generates.<sup>7</sup> An unavoidable consequence

---

3. See *infra* Part I.

4. See Carol M. Rose, *Introduction: Property and Language, or, the Ghost of the Fifth Panel*, 18 YALE J.L. & HUMAN. 1, 3–11 (2006) (discussing property as an expressive endeavor).

5. Property, of course, communicates many messages that are not related to status or hierarchy. See MARY DOUGLAS & BARON ISHERWOOD, *THE WORLD OF GOODS* 4, 9 (1979) (discussing the wide array of gestalt meanings that possessions can communicate, including finality, respectability, and privacy). For further discussion of the varied meanings associated with property, see *infra* Section II.C.

6. Property must be understood here both in the sense of material and intangible goods—the objects of property law—as well as property law itself. C.B. Macpherson, *The Meaning of Property*, in *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS* 1, 2 (C.B. Macpherson ed., 1978) (“In current common usage, property is *things*; in law and in the writers, property is not things but *rights*, rights in or to things.”); see also *id.* at 6–9. While it is the objects of property law that most often reinforce status, in a variety of ways property law itself drives status-related dynamics. See *infra* Part IV. Indeed, even where status signaling is primarily a question of material culture—the resource rather than the rules governing that resource—property law directly affects how that material culture is formed and relevant resources allocated.

7. See MIHALY CSIKSZENTMIHALYI & EUGENE ROCHBERG-HALTON, *THE MEANING OF THINGS: DOMESTIC SYMBOLS AND THE SELF* 30 (1981) (“[S]tatus—or the ability to control meaning in one’s community—has become, to a certain extent, independent of other sources of control and has taken on a life of its own. Wealth, political power, talent or physical prowess are still the stuff from which status is made, but one can maintain or even gain status by manipulating its symbols for one’s own purposes. This is where the importance of things as status symbols lies.”). In

of any system of private property is that some individuals and groups will inevitably have *more* property than others. Much can be said about the particular patterns of inequality that flow from the structure of property rights at any given time and, conversely, the limits of redistribution consistent with any basic conception of private property. But property relates to hierarchy in a separate sense in the way that material possessions are not only unequally distributed, but also used to mark and reinforce status boundaries. A house in one neighborhood that is “objectively” quite similar to a house in another neighborhood in terms of square footage, distance to work, and other amenities may nonetheless carry entirely different social and cultural messages as a marker of status. Such signaling can be accurate or inaccurate, conscious or unconscious, with complex cultural, gender, and other variations—but the signal is an overlay onto actual material differences, and merits examination as a distinct phenomenon.

The concept of property as a signal for social hierarchy has an intellectual history stretching back to some of our foundational thinking on property and society.<sup>8</sup> And status signaling through property continues to generate significant scholarly interest, sparking a rich contemporary literature in fields as diverse as psychology, sociology, anthropology, and economics, as well as in specialized areas such as consumer and cultural studies.<sup>9</sup> This interdisciplinary scholarship, although grounded in somewhat incongruent methodological commitments and theoretical assumptions, can be read at the appropriate level of abstraction to yield several related insights. First, people communicate, in part, through consensually understood symbols that gain their meaning through the way people interact around those symbols. In this communication, property serves as an important locus for symbolic meaning. In a related vein, people tend to compare themselves to others as a way to understand themselves. Here again, property serves as a particularly powerful source of information for that comparison. And this comparative communication has clear and often negative consequences for people’s incentives and behavior around property.<sup>10</sup>

These insights form a core framework for understanding status signaling through property that has direct lessons for contemporary property theory, offering both a more complete descriptive account and new grounds for normative concern. People’s propensity to use property to signal status and the consequences of the resulting status races have long been seen as problematic in the popular imagination. Indeed, recognition of the moral anxiety these dynamics produce is at least as old as the biblical injunction against

---

contemporary culture, status plays out across a variety of dimensions, although property remains an important definitional force. *See infra* text accompanying notes 145–49.

8. *See infra* Section II.A.

9. *See infra* Section II.B.

10. The drive to make interpersonal comparisons and the tendency to do so through property are by no means universal or inherent in the sense that these aspects of personality and social interaction manifest themselves similarly (or even at all) in all individuals and all cultures. Moreover, there are important gender, age, life-cycle and other variations to these dynamics, as will be explored below. *See infra* Section II.C.

coveting your neighbor's possessions.<sup>11</sup> But unpacking this concern significantly complicates the central discourses that shape contemporary property theory, presenting potentially troubling counterpoints to what are often optimistic narratives in legal scholarship.

For visions of property that focus on incentives and resource allocation, status signaling can distort the function that property rights are said to serve.<sup>12</sup> If people seek particular kinds of property and transact around property to satisfy what Richard McAdams calls relative preferences,<sup>13</sup> this may over-incentivize the production of, or investment in, status-related resources. These kinds of incentives perennially risk misallocation, both between the choice to invest resources in property and the choice not to, and between status-related versus non-status-related resources within the realm of property. Likewise, status races around property may obstruct bargaining about property because relative status may be as important to the parties as any underlying material benefits to be obtained by the exchange. And to the extent that property is invoked as a proxy for utility maximization—material resources as a measure of welfare—the shifting preference satisfaction generated by comparisons through property may undermine welfare gains associated with the accumulation of property. Simply put, there is increasing evidence that beyond a basic level, more property does not necessarily yield more well-being.

Next, status signaling also complicates any unalloyed veneration of property's role in shaping and bolstering individual identity.<sup>14</sup> If a central aspect of property is the competition and instability that flows from defining one's sense of self by comparison to the possessions of others—a protean measure at best—then property may have as much potential to warp personhood as to foster it. The need to match or conform to or even react against the property of others can entangle this role for property in an ever-changing and in many regards inauthentic feedback loop. Status signaling through property may accordingly invest people's relationship with material things with a potentially dysfunctional regard for other people's property.

Finally, the very interconnectedness reflected in social-relations conceptions of property may reinforce the institution's capacity to fuel competitive consumption and undermine the communitarian benefits of property.<sup>15</sup> If individuals are deeply conscious of the possessions of others, particularly those in relatively similar material circumstances, the links that property creates may serve as an engine for the communication of comparative positioning. Between communities, moreover, status signaling through property can widen the gulfs material inequality generates. It may be, then, that the

---

11. *Deuteronomy* 5:21 (New Revised Standard Version) ("Neither shall you desire your neighbor's house, or field, or male or female slave, or ox, or donkey, or anything that belongs to your neighbor.").

12. See *infra* Section III.A.

13. Richard H. McAdams, *Relative Preferences*, 102 *YALE L.J.* 1 (1992).

14. See *infra* Section III.B.

15. See *infra* Section III.C.

more we are bound together through property, the more problematic relative status becomes.

Just as legal scholars have left the phenomenon of status signaling through property under-theorized, scholars in other disciplines have been generally uninterested in the role law plays in that phenomenon. In reality, there are a number of intersections between status signaling and the legal institution's ground-level design. Property law at times gives state sanction to, or provides the legal underpinnings for, the hierarchical tendencies at work in status signaling. This is evident in intellectual property, land use, real estate, and mortgage law, among other areas, where law variably reifies status, gives it shape, or provides the conditions to facilitate status races.

Conversely, law at times makes status more fluid, creating anxiety but also opportunity. Ambivalence about status signaling is evident in the structure of property doctrines such as rules on restraints against alienation, limits on commodification, involuntary transfers through eminent domain and adverse possession, and other areas where a change in legal relations corresponds to a change in symbolic meaning. In each of these areas, as the law loosens the grip of status, it also provides tools for new hierarchies to emerge.

It is important to avoid the simplistic temptation to think that tinkering with the structure of property can significantly change underlying individual and cultural norms.<sup>16</sup> Nonetheless, recognizing the intricate intertwining of doctrine and status signaling suggests that the design of property law may be a way to temper some status races. Scholars have largely focused on tax or penalty approaches—in essence reducing the fuel available for status races. It might also be possible to regulate the signals that property sends, but this would be a challenging role for the state. Property law, however, might serve as a coordination mechanism, serving as a kind of firebreak for status spirals. With appropriate caution, then, sensitivity to the status-signaling consequences of doctrinal design can provide a lens through which to mold changes in property law to moderate what is normatively troubling about the phenomenon.

In the end, it should hardly be surprising that status signaling is bound up in why people seek property, how people allocate property, and what people do with property once they have it. It may, however, be counter-intuitive that this aspect of property is gaining in significance. Status signaling through property has traditionally been associated with the upper strata of society—the top-hat and tuxedo-wearing dandies so often associated with Thorstein Veblen's leisure class.<sup>17</sup> However, our contemporary mass consumer culture has spread the status-associated expressive qualities of things

---

16. See Kenneth R. Minogue, *The Concept of Property and Its Contemporary Significance*, in NOMOS XXII: PROPERTY 3, 8 (J. Roland Pennock & John W. Chapman eds., 1980) ("The simple idea that it needs only a change in some external thing (such as the structure of property rights) to transform the human condition is superstition lurking behind many treatments of the subject.").

17. THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* (Martha Banta ed., Oxford Univ. Press 2007) (1899).



to almost all levels of society.<sup>18</sup> The mass nature of this competitive consumption draws on and at the same time feeds a deep well of status anxiety, even (and perhaps especially) in times of economic crisis.<sup>19</sup>

Given that this central and increasingly important aspect of property has gone unexamined in depth in the contemporary legal scholarship,<sup>20</sup> this Article makes three contributions to the literature. First, it adds to legal scholarship a general framework for understanding property's status-signaling function. Second, it illustrates how contemporary property theory remains incomplete and, in important respects, misguided in the absence of an appreciation of this aspect of property. Third, the Article's exploration of the role of law in this phenomenon adds a new perspective to the growing interdisciplinary dialogue on property and status signaling.

Accordingly, Part I begins with a fuller outline of the three discourses in property theory noted above: property as a source of incentives for production and as an allocative response to scarcity; property as a means of developing individual autonomy and bolstering personhood; and property as an institution that reflects and shapes social relations. Part II then surveys how scholars historically and today have explored property's status-signaling function. Part III returns to property theory to demonstrate how this interdisciplinary understanding complicates each of the three discourses. Finally, Part IV shifts from theory to doctrine, examining how property law both bolsters and undermines property's status-signaling function. This recognition, ultimately, provides a normative frame for engaging legal design to temper status races through property.

---

18. JULIET B. SCHOR, *THE OVERSPENT AMERICAN: UPSCALING, DOWNSHIFTING, AND THE NEW CONSUMER* 7–19 (1998).

19. For a sample of the slew of recent popular accounts of current anxieties around status, see, for example, ALAIN DE BOTTON, *STATUS ANXIETY* 3–4 (2004), which describes status anxiety as “[a] worry so pernicious as to be capable of ruining extended stretches of our lives, that we are in danger of failing to conform to the ideals of success laid down by our society and that we may as a result be stripped of dignity and respect; a worry that we are currently occupying too modest a rung or are about to fall to a lower one,” and NAN MOONEY, (NOT) KEEPING UP WITH OUR PARENTS: *THE DECLINE OF THE PROFESSIONAL MIDDLE CLASS* (2008).

20. This is not to say that legal scholars have entirely ignored the dynamics that inform status signaling through property. See, e.g., McAdams, *supra* note 13 (discussing other-regarding preferences in a variety of contexts, primarily to complicate law and economics understandings of demand); Anita Bernstein, *How Can a Product Be Liable?*, 45 DUKE L.J. 1, 27–31 (1995) (discussing the communicative meaning of objects in the context of reframing product-liability law). And some property scholars have noted aspects of this phenomenon in particular contexts. See, e.g., Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047, 1111–13 (2008) (exploring comparative-status considerations in home-ownership decisions). Moreover, in a tangential but not entirely unrelated vein, Henry Smith and Thomas Merrill have done significant work on information costs and property law. See, e.g., Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000); Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105 (2003). Merrill and Smith's scholarship brings to the fore important aspects of how individuals transact around property rights—and the legal system's reaction to the challenges posed by uncertainty. This Article, by contrast, focuses on a broader and more culturally embedded sense in which the objects of property law and property law itself communicate, particularly about status.

## I. FUNCTIONAL DISCOURSES IN CONTEMPORARY PROPERTY THEORY

There are at least as many ways to approach property as there are academic disciplines or schools within those disciplines. Because signaling status is ultimately a functional aspect of property, it is appropriate to begin by organizing primary themes in property theory around pragmatic concerns. This Part thus outlines three central discourses that frame contemporary property theory in the legal literature, grouped according to property's relation to allocation, identity, and social relations.<sup>21</sup>

Each discourse reflects the primacy of certain instrumental aspects of what property does and at the same time mirrors a corresponding set of normative justifications for the arrangement of legal institutions concerning property.<sup>22</sup> These discourses are not mutually exclusive and this exploration is necessarily reductionist, but understanding these common touch points serves as a useful baseline for considering what *else* property might be doing in our daily lives.<sup>23</sup>

## A. Property as a Response to Scarcity: Of Incentives and Allocation

If a perspective on property might be said to have achieved dominance in contemporary theory, it is the basic utilitarian and economic perspective that sees the institution of property primarily as a response to problems posed by scarcity.<sup>24</sup> This parses into two distinct, but related, underlying concerns. The first concern is with creating the incentive for labor and investment.<sup>25</sup> As the argument has long been, without security of property,

21. The discourses summarized in this Part represent something of a "mainstream" view of property theory, and it is important to acknowledge that there have long been critical perspectives that have directly and forcefully questioned the validity of each of these discourses. *See, e.g.*, Macpherson, *supra* note 6, at 11–13. As discussed below, this Article's examination of the role of property in status signaling seeks to complicate and deepen our understanding of the underpinnings of these discourses but does not argue against the institution of property as such. *See infra* Part III and note 277.

22. Each of these discourses carries with it explicit or implicit assumptions about human nature and motivation, the texture of social interaction, and, of course, the moral foundations of rights associated with property. This Part briefly notes some of those assumptions, but reserves direct engagement with those questions until Part III.

23. A fourth foundational discourse centers on the complex relationship between property and political liberty. *See generally* RICHARD SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* (Russell & Russell 1973) (1951). This discourse posits property as, alternatively, a creation of, or a bulwark against, the state. Given this Part's functionalist approach, it is appropriate to defer this strand of thought as an independent concern until the Article's discussion of the state's role in responding to status signaling in Part IV.

24. This vision of property has its roots in utilitarianism, although strictly utilitarian arguments could likewise be deployed to undermine any particular arrangement of property rights. ALAN RYAN, *PROPERTY AND POLITICAL THEORY* 92–95 (1984). This discourse generally finds expression today in economics and in economically oriented legal scholarship.

25. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.1 (7th ed. 2007) (arguing that even where consumer demand exceeds the costs of production, "without property rights there is no incentive to incur these costs because there is no reasonably assured reward for incurring them"); *see also* Dean Lueck & Thomas J. Miceli, *Property Law*, in 1 *HANDBOOK OF LAW AND ECONOMICS*

primarily in the sense of the right of exclusion, individuals will not be secure in the knowledge that they can reap what they sow, falling into the classic Hobbesian trap.<sup>26</sup> Jeremy Bentham in the utilitarian tradition is perhaps most closely associated with the proposition that property is nothing more (and, importantly, should not be anything less) than the basis for expectation,<sup>27</sup> but the incentive rationale is central to most contemporary economic accounts of property. Indeed, two scholars recently went Bentham one further, arguing that the overriding purpose of property as a legal institution is the creation and protection of the value that they see as inherent in the stable ownership of assets.<sup>28</sup>

Beyond providing security to incentivize the creation or development of resources, the second primary concern this discourse highlights is how to allocate those scarce resources and resolve the inevitable conflicts that scarcity generates. Harold Demsetz provides a standard starting point for understanding how property fulfills these roles. To Demsetz, the emergence of private property from the commons represents a response to changes in the costs and benefits of exclusion. Where it is more costly to have a regime of exclusivity than open or common access to a resource, property rights will remain in the commons, but where there are gains to be made from internalizing costs and benefits, property rights will emerge.<sup>29</sup> It is easy to criticize Demsetz, as scholars have done, for eliding the mechanism through which this transformation was to have occurred.<sup>30</sup> Demsetz's account, however, still stands for the proposition that private property will tend to align the private costs and benefits of decisions about the use of resources with the social consequences of those decisions and will also facilitate further interactions around property by reducing the transaction costs of those interactions.<sup>31</sup>

---

183, 186 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (defining property rights as a "social institution that creates incentives to efficiently use assets, and to maintain and invest in assets").

26. As Thomas Merrill and Henry Smith have noted, William Blackstone emphasized the link between security of property and incentives but was preceded in doing so by writers such as Thomas Hobbes and David Hume. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 361–62 & n.13 (2001); see also Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1967) ("Property rights are an instrument of society and derive their significance from the fact that they help a man form those expectations which he can reasonably hold in his dealings with others.").

27. JEREMY BENTHAM, THE THEORY OF LEGISLATION 111–12 (C.K. Ogden ed., Richard Hildreth trans., Harcourt, Brace & Co. 1931) (1802) ("Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it.").

28. Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531 (2005).

29. See Demsetz, *supra* note 26, at 349.

30. E.g., James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL'Y 325, 336 (1992); Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117, 121 (2005).

31. Another prominent allocation problem associated with property rights—a "reciprocal" tragedy to that of the commons on which Demsetz focused—is the problem of fragmentation. Michael Heller has built a general theory of the anticommons, through which legal rules operate to

Prescriptively, scholars focused on incentives and allocation tend to start from a presumption of the advantages of relatively stronger property rights, with infringements on rights of use, exclusion, and disposition to be justified in the first instance as deviations from this norm.<sup>32</sup> Where conflicts over resources arise, a corresponding preference is often found for legal rules that facilitate bargaining<sup>33</sup>—again, with the presumption that clear property rights do just that.<sup>34</sup> If transaction costs stand as a barrier to bargaining, the preferred legal rule is one that lowers transaction costs.<sup>35</sup> If transaction costs entirely preclude bargaining, efficiency suggests that remedies should approximate what a bargained-for resolution would have achieved.<sup>36</sup> This focus on remedial structure has given rise to a significant literature building on the distinction between property rules and liability rules.<sup>37</sup> Although this perspective allows that some resource conflicts may be better managed through a governance strategy than an exclusion strategy<sup>38</sup> and a recognition of the safety-valve function of liability rules in some circumstances, in the end exclusion and its analogue in property-rule protection for entitlements predominate.<sup>39</sup>

This is a familiar account, but there is an aspect of this discourse that bears direct relevance to understanding the consequences of status signaling through property. One important, if frequently unstated, assumption underlying much of the diverse literature in this utilitarian and economic tradition is that the demand being satisfied through the legal institution of property is

---

scale ownership to avoid the problem of underutilization of resources. MICHAEL HELLER, *THE GRIDLOCK ECONOMY* (2008); see also Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in *NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW* 3, 6, 9 (J. Roland Pennock & John W. Chapman eds., 1982) (positing the anticommons as a thought experiment).

32. This strong property rights baseline is often associated with Blackstone's famous description of property as sole and despotic dominion in total exclusion of the rights of others, but Blackstone himself was hardly Blackstonian about property. David B. Schorr, *How Blackstone Became a Blackstonian*, 10 *THEORETICAL INQUIRIES IN L.* 103 (2009); see also Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 *YALE L.J.* 601 (1998).

33. See R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960).

34. This might be because uncertainty about legal rules is a transaction cost or because there are information-cost barriers to understanding a relatively certain set of legal rules. Accordingly, the argument goes, efficiency prescribes simplicity and clarity in property rights. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 93 (5th ed. 2008).

35. *Id.* at 97.

36. *Id.* at 89, 104. Cooter and Ulen abstract this out to the argument that in the presence of transaction-cost barriers to exchange, the law should assign property rights to the party that values them most. *Id.* at 98.

37. The root of this theme in the scholarship is Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972), which has spawned a vast literature. E.g., Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty about Property Rights*, 106 *MICH. L. REV.* 1285, 1289–95 (2008).

38. Henry E. Smith, *Exclusion versus Governance: Two Strategies for Delineating Property Rights*, 31 *J. LEGAL STUD.* S453 (2002).

39. Henry E. Smith, *Property and Property Rules*, 79 *N.Y.U. L. REV.* 1719 (2004). This perspective on property also tends to favor making as much of the world as possible the object of property. This universality has been critiqued by scholars concerned with the perils of commodification. See *infra* note 51.

essentially self contained. This follows from the proposition in neoclassical economics that the decision to consume is endogenous, and that production follows the consumption function.<sup>40</sup> The corresponding assumption in the literature is that people generally disregard others in consuming, focusing exclusively on their own internally generated needs.<sup>41</sup>

Some economists and commentators in other fields have challenged this traditional aspect of demand theory, highlighting the interdependence of demand in many circumstances.<sup>42</sup> As we shall see, changing this assumption affects many aspects of the vision of property centered on incentives and allocation through exchange.

### *B. Property and the Extended Self: Autonomy and Personhood in the Material World*

A second major functional discourse shifts from problems of scarcity and allocation to a different set of concerns centered around the link between property and individual development or identity. It is intuitive that property—possessions of all sorts—form an important part of what William James described as the extended self. James famously stated:

[I]t is clear that between what a man calls *me* and what he simply calls *mine* the line is difficult to draw. We feel and act about certain things that are ours very much as we feel and act about ourselves. . . .

. . . *In its widest possible sense, however, a man's Self is the sum total of all that he CAN call his*, not only his body and his psychic powers, but his clothes and his house, his wife and children, his ancestors and friends, his reputation and works, his lands and horses, and yacht and bank-account. All these things give him the same emotions. If they wax and prosper, he feels triumphant; if they dwindle and die away, he feels cast down[]—not necessarily in the same degree in each thing, but in much the same way for all.<sup>43</sup>

Theorists, however, have developed a sophisticated vocabulary to understand the dimensions of this psychological and developmental role for property.

40. MILTON FRIEDMAN, *ESSAYS IN POSITIVE ECONOMICS* 62 (1953).

41. ROBERT H. FRANK, *CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS* 37 (1985) ("In setting up formal models of economic behavior, economists almost always assume at the outset that a person's sense of well-being, or utility, depends on the absolute quantities of various goods he consumes, not on how those quantities compare with the amounts consumed by others."); McAdams, *supra* note 13, at 7.

42. See *infra* Section II.B.3.

43. WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 291–92 (Cosimo, Inc. 2007) (1890). Despite the anachronistically gendered tone of this passage, the insight that our sense of self is directly linked to our material possessions is widely recognized. Indeed, as Floyd Rudmin has noted, the link between property and identity has been a recurrent theme in the property literature since at least as far back as Aristotle. Floyd Webster Rudmin, *Ownership as Interpersonal Dominance: A History and Three Studies of the Social Psychology of Property* 6–8 (Mar. 1988) (unpublished doctoral thesis, Queen's University) (on file with author).

A common starting point for considering property's role in individual identity is Hegel. Particularly in his *Philosophy of Right*, Hegel articulated a conception of human freedom grounded in the realization of the spirit or *Geist*—the “Idea” or “Concept of freedom.”<sup>44</sup> For Hegel, mastery over objects in the material world constituted an important step in the process through which individuals become aware of this universal idea or concept in themselves.<sup>45</sup> Hegel thus linked ownership to moral development, envisioning the imposition of the will on the external world as a first step in an individual's progression toward free will.<sup>46</sup> By controlling property, an individual gives that free will a stability that is a necessary step to joining the community of others with similarly mature wills.<sup>47</sup>

Although this Hegelian conception of property's role can be notoriously obscure (and its political commitments questionable), Hegel's emphasis on the development of individual identity through control over the material world is still a central way scholars think about the work of property. Margaret Radin approached this same nexus from a different direction, starting with what she described as an intuitive claim about the necessity of control over resources for people to achieve an individuated sense of self.<sup>48</sup> The loss of some types of property, such as a wedding ring, Radin observed, intuitively wrenches the emotions more than the loss of other possessions less constitutive of the self.<sup>49</sup> Radin took this basic distinction and derived a justification structure for property rights that would privilege identity-reinforcing aspects of “personal” property over “fungible” property.<sup>50</sup> Thus, Radin argued, law might recognize the need to protect the stability around identity connected to the aspect of personhood expressed through material goods.<sup>51</sup>

---

44. G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 40–57 (T.M. Knox trans., Oxford Univ. Press 1942) (1821). Beyond the more psychological aspects of Hegel's claims that appear in *Philosophy of Right*, Hegel also discussed property in more sociological terms, focusing on tensions between property owners and those without property in some of his earlier writing. RYAN, *supra* note 24, at 119.

45. To Hegel, “individuals need private property in order to sustain and develop the abilities and self-conceptions definitive of their status as persons,” and thus “they need to be able to ‘embody’ the freedom of their personalities in external objects so that their conceptions of themselves as persons cease to be purely subjective and become concrete and recognizable to themselves and others in a public and external world.” JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 353 (1988).

46. For a discussion of Hegel's view of moral progression, see Peter G. Stillman, *Property, Freedom and Individuality in Hegel's and Marx's Political Thought*, in *NOMOS XXII: PROPERTY*, *supra* note 16, at 130, 130–31.

47. WALDRON, *supra* note 45, at 378.

48. Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 957 (1982).

49. *Id.* at 959.

50. *Id.* at 986–88.

51. *Id.* at 1013–15. Focusing on the concern that certain aspects of the self should not be made the object of property, or at least should not be made the basis for exchange, Radin and others have offered a counterpart to the universalizing tendencies of utilitarian and economic perspectives on property. *E.g.*, Margaret Jane Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849 (1987).

Hegel's philosophical perspective on the role of property in the development of free will and Radin's intuitive focus on the importance of possessions to the self can both, on a basic level, be understood as psychological claims.<sup>52</sup> Psychologists and psychoanalytic theorists—not only those in the Jamesian social-psychology tradition, but also descendents of Freud and Jung—have themselves directly engaged with the connection between property and the self.<sup>53</sup> There is theoretical and empirical literature, for example, that highlights the role of property in child development, exploring the role of possessions in early childhood.<sup>54</sup> Similarly, studies have examined how property can help individuals retain a sense of self in old age.<sup>55</sup> And scholars have developed an extensive literature on the psychological aspects of ownership, one theme of which is a view of property as the symbolic and concretized manifestation of individual identity at all life stages.<sup>56</sup>

Just as the basic economic approach to property generally assumes endogenous demand, it is likewise significant that prevailing conceptions of property and identity take the relationship between property and personhood as largely inward looking. Hegel, for example, seems to take the imposition of the will on the external world as an almost heroic quest of the individual in the drive toward reason. While Hegel's conception requires that others recognize the imposition of will,<sup>57</sup> it assumes that individuals will shape the nature of ownership driven by their own interests in the world.

52. Although Radin herself did not focus in depth on the psychological aspects of her personhood theory, others have. *E.g.*, Stephanie Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. (forthcoming May 2009) (manuscript at 17–32, on file with author); D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 277–82 (2006).

53. See generally Leonard Bloom, *People and Property: A Psychoanalytic View*, in *TO HAVE POSSESSIONS: A HANDBOOK ON OWNERSHIP AND PROPERTY* 427 (Floyd W. Rudmin ed., 1991); Jon L. Pierce et al., *The State of Psychological Ownership: Integrating and Extending a Century of Research*, 7 REV. GEN. PSYCHOL. 84 (2003). See also Jeremy A. Blumenthal, *"To Be Human": A Psychological Perspective on Property Law*, 83 TUL. L. REV. (forthcoming Feb. 2009).

54. *E.g.*, Lita Furby, *The Origins and Early Development of Possessive Behavior*, 2 POL. PSYCHOL. 30, 35 (1980) ("Possessions become integrated with the child's developing concept of self because they offer a very high degree of contingent control, almost as great as the control one experiences over one's body."). As Rudmin notes, the link between childhood development and possessions can be traced to James. Rudmin, *supra* note 43, at 22. See generally *id.* at 40–43 (reviewing studies of possessive behavior and related topics in child development).

55. *E.g.*, HELGA DITTMAR, *THE SOCIAL PSYCHOLOGY OF MATERIAL POSSESSIONS* 115–16 (1992).

56. *E.g.*, CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 7. This literature highlights the role of possessions in reinforcing memory (as with favorite pictures), defining aspects of self (as with favorite music), and also shaping our sense of self in more abstract terms (as with possessions used to bolster confidence and stave off negative emotions). Much has been written about consumption as expressive of identity more generally. *E.g.*, SCHOR, *supra* note 18, at 45–63.

57. WALDRON, *supra* note 45, at 375–77.

Likewise, for Radin, the personhood that can become tied up in property seems largely self-directed.<sup>58</sup> One envisions from Radin an individual going out into the world and binding her sense of self to various objects. Although some of the meaning attached to any particular object might reflect relationships (as with a wedding ring), the process of meaning formation remains largely an autonomous construction of the self. The relationship between property and the self thus presumes a process of individuation where what is significant about the personal-property relationship is internal—the memories attached to an object, what a place says about “who I am,” how a possession is used to advance personal well-being.

Personhood theories, in short, tend to assume that if property helps define identity, it does so largely as a self-contained exercise. As with the self-regarding consumption that is a predicate to utilitarian and economic perspectives, changing the assumption about how self-contained the exercise of embodying identity through property is can change our understanding of this discourse in property.

### C. Property, Community, and Social Relations

A final important discourse around property shifts from the scarcity of resources and the nature of identity as central organizing concerns and instead looks to property as a construct—and creator—of social relations.<sup>59</sup> This enduring communitarian perspective has had many iterations, but throughout has presented a functional vision of property as the realm of deeply embedded relationships and community, with a normative focus on the obligations that arise from these interconnections.<sup>60</sup>

The legal realists, particularly Felix Cohen, Morris Cohen, and Robert Hale, laid the groundwork for our modern understanding of the role of social relations in property.<sup>61</sup> To the realists, property rights, far from natural or abstract propositions, were understood to grow out of particular social conditions, reflecting state decisions about the distribution of entitlements. These distributional choices inherently limit the freedom of those against whom property rights—particularly, but not only, exclusionary rights—are

58. Cf. Stern, *supra* note 52 (manuscript at 22) (arguing that, although Radin acknowledged the expressive aspects of property, her focus was primarily on property’s “self-constructive” function).

59. See generally Stephen R. Munzer, *Property as Social Relations*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 36 (Stephen R. Munzer ed., 2001).

60. Property as social relations shares a close conceptual affinity with ecological perspectives on property, which likewise emphasize the embedded and interconnected nature of property. E.g., Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281 (2002); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 152 (1971) (“Particular parcels are tied to one another in complex ways, and property is more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing.”).

61. Indeed, the phrase “property as social relations” can be traced to Felix Cohen. Munzer, *supra* note 59, at 38 (noting that the phrase was coined in Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 361 (1954)).



asserted, and facilitate a kind of state-backed private coercion involved in market relations.<sup>62</sup> Property, in this view, is a social construct and it is as natural to talk about the right to exclude as it is to posit a right “not to be excluded” as an incident of property.<sup>63</sup>

For some social-relations theorists, the choice to privilege one party over another in any property relationship carries with it the potential instead to foster mutual obligation.<sup>64</sup> Thus, civic republican perspectives emphasize that with property comes responsibility to society and obligations to the community.<sup>65</sup> And the relational aspects of property are also seen to give rise not just to general common duties, but to specific interpersonal obligations.<sup>66</sup> Property and expectation, in this view, can mediate individual relations, with property rights emerging as reflections of the relationships that property fosters.<sup>67</sup> Property may create community boundaries as much as it creates individual boundaries against the state or the community.<sup>68</sup>

A final strain of social-relations thinking highlights the essentially social character of individuals as a descriptive and normative frame. Some scholars have argued that this inherent social nature yields a view of property as necessary to foster the flourishing associated with that social character.<sup>69</sup> Others look to Aristotelian and Thomistic conceptions of the intrinsic nature of individuals as social beings to reach a similar conclusion.<sup>70</sup> Property is thus seen to serve “as a means of joining individuals to each other in community,” reflecting a deep “human need for stable companionship and sociability.”<sup>71</sup>

Collectively, social-relations theories often gain traction through opposition to Lockean-liberal conceptions of the absoluteness of property.<sup>72</sup>

62. See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). See generally ROBERT L. HALE, *FREEDOM THROUGH LAW* (1952).

63. Macpherson, *supra* note 6, at 4.

64. Gregory Alexander has labeled this perspective the “proprietary” vision of property. See generally GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970* (1997).

65. See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. (forthcoming May 2009).

66. See Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988) [hereinafter Singer, *Reliance Interest*]. See generally JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 209–13 (2000) [hereinafter SINGER, *ENTITLEMENT*].

67. Singer, *Reliance Interest*, *supra* note 66.

68. Davina Cooper, *Opening Up Ownership: Community Belonging, Belongings, and the Productive Life of Property*, 32 LAW & SOC. INQUIRY 625, 629–30 (2007) (arguing that the “most important” element of the work of property is “belonging” as defining social relations within a larger group).

69. Jennifer Nedelsky, *Law, Boundaries and the Bounded Self*, 30 REPRESENTATIONS 162 (1990); Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. 1 (1993).

70. Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889 (2005); see also Gregory Alexander & Eduardo Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES IN L. 127 (2009).

71. Peñalver, *supra* note 70, at 1894.

72. See SINGER, *ENTITLEMENT*, *supra* note 66, at 207–08.

Property, to social-relations theorists, is less about a zone of freedom from state and community control, and more about the ties that bind neighbors, employers and employees, landlords and tenants, and similar relationships mediated through the material world. This expansive view of property rights challenges the notion that property begins as a core of fairly stable rights of use, exclusion, and disposition against which interventions from the state should be understood as derogations. Rather, social-relations theorists understand that the very definition of property carries with it inherent limitations and mutual obligations.

This is an important corrective to overly exclusionary visions of property. What is significant at this juncture, however, is less what property and social-relations theories say about the nature of coercion and autonomy and more what this approach presents as a functional vision of how property operates—property as flowing from, and in turn shaping, deeply embedded, context-specific relationships. And just as the link between property and identity is functionally a psychological claim, property and social relations not surprisingly brings to legal scholarship something of a sociological perspective. Accordingly, social-relations theorists are particularly sensitive to concerns about power imbalances embodied in the structure of property law, the distributional consequences of apparently neutral entitlements, and the responsibilities that ownership can entail for collective well-being.<sup>73</sup>

In marked distinction to the essentially inward-looking perspectives that undergird the first two discourses examined in this Part, the vision of property as social relations is deeply centered on the interconnectedness of property. Despite this awareness, however, scholars in this tradition have not paid much attention, if any at all, to the status-signaling aspects of this interconnectivity. This is as much a gap in the social-relations discourse as interconnection is in the exclusionary visions of property economists offer and the internal perspective identity theorists favor.

In sum, from a functional perspective, property in contemporary theory is variably understood as a response to scarcity, as a foundation for individual identity, and as both the glue for and residue of social relations. The role that property plays in signaling status, we shall see, complicates each of these visions in fundamental ways, and the next Part lays the foundation for unpacking the nature of that role.

## II. THEORIES OF PROPERTY AND STATUS SIGNALING

Anyone watching the way children in a sandbox instantly define who is important by who happens to have a shovel or pail while the most desirable shovel or pail is always the one being held by another child can understand how property can shape, signal, and reinforce status hierarchies as well as how those hierarchies shape what makes property significant. These dynamics have long been fodder for social thinkers who have historically grappled with the nature of property, particularly as modern conceptions of markets

---

73. See *supra* text accompanying notes 61–68.

and individual consumers emerged. Building on these historical perspectives, contemporary scholars in an array of disciplines, including sociology, social psychology, anthropology, economics, and others, have continued to develop a complex, robust vocabulary and empirical grounding to explain and bolster our understanding of this aspect of property.

This Part synthesizes this historical and more recent scholarship to offer a framework for understanding property's role in signaling comparative status. The task here is not to provide a definitive account of status signaling, but rather to limn the general outlines of how, why, and to what effect people use property to communicate their relative position.<sup>74</sup>

### A. Comparative Status in the Intellectual History of Property

The intellectual history of property evinces a long tradition of thinkers recognizing a comparative dynamic around material possessions.<sup>75</sup> Variations on the basic ideas, then, that people compare themselves with others on the basis of their property, that that comparison can be a fundamental motivation, and that this process of comparison can be troubling for what it does to the signaler and the recipient recur repeatedly.

Early modern thinking about property coincided with a cultural moment that paired the end of feudalism with the first stirrings of consumer culture.<sup>76</sup> For centuries, particularly in England, property in the sense of land tenures reflected a clear hierarchy of fixed status, with a chain reaching from the king down through various mense lords to the lowest villeins.<sup>77</sup> To have property was to occupy a place in that chain, owing duties to superiors and subordinates, with a vast legal and political structure reinforcing the meaning and content of these fixed hierarchies.

As land became increasingly alienable, feudalism gradually gave way to a legal system in which the link between property and status became correspondingly attenuated. As merchants were beginning to replace the landed gentry as the center of power, Western thought was turning away from the predominance of fixed categories, such as kin groups and clans, for

---

74. There is always a risk in this kind of interdisciplinary survey of cherry picking relevant insights while minimizing the theoretical richness and often clashing incompatibilities inherent in the exercise. It is important to acknowledge this risk—although this is not often enough done—and be clear that no claim is made here for exhausting the literature or reconciling the irreconcilable. Nonetheless, it would be just as inappropriate to ignore bodies of work that present stable, coherent themes that bear direct relevance, where they exist.

75. Discussions of the connection between property and status signaling go back as far as classical thought. See, e.g., Rudmin, *supra* note 43, at 7, 49 (arguing that when Aristotle wrote, in *Ethics*, that “the magnificent man spends not on himself but on public objects,” he was acknowledging property’s ability to signal status and cautioning against reinforcing “social distinction through consumption”).

76. Cf. GRANT McCracken, *CULTURE AND CONSUMPTION: NEW APPROACHES TO THE SYMBOLIC CHARACTER OF CONSUMER GOODS AND ACTIVITIES* 10–22 (1988) (discussing the significant changes in patterns of consumption in the sixteenth and eighteenth centuries).

77. JESSE DUKEMINIER ET AL., *PROPERTY 175–77* (6th ed. 2006); see also David Lieberman, *Property, Commerce, and the Common Law*, in *EARLY MODERN CONCEPTIONS OF PROPERTY* 144 (John Brewer & Susan Staves eds., 1995).

individual identity and beginning to focus on rationality and a science of autonomous human behavior.<sup>78</sup> The landed gentry required increasing amounts of wage labor to work the land, and novel demands sparked a movement toward the democratization of rights.<sup>79</sup> Sectors of society relegated to low status under premodern conditions began, if tentatively at first, to assert freedom to develop their personalities in their own way.<sup>80</sup> Reflecting this shift, a number of Enlightenment and later thinkers grappled with the signaling aspects of property and their effects on incentives and identity, recognizing the fluidity of status and the increasing role of wealth and possessions in marking what had previously been clear, relatively singular hierarchical structures.<sup>81</sup>

Early in the Enlightenment, for example, David Hume offered a glimpse of how the new commercial and social reality was to be understood. Hume wrote extensively about the determinants and consequences of pride, citing personal connection with property as a primary source of that pride and also a way people evaluate others.<sup>82</sup> Hume emphasized that people are motivated by what they think of their own state largely in comparison with others, with “objects” and “wealth” critical determinants of this comparison.<sup>83</sup>

Although property scholars focus on what John Locke said about property’s origins and justification, like Hume, Locke speculated on the link between the symbolism of property and status. Indeed, Locke was perhaps the earliest thinker to note that for some things, high prices contributed to, rather than detracted from, their demand.<sup>84</sup> Prefiguring modern notions of conspicuous consumption, Locke tried to explain this apparent puzzle by

78. CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 11–12 (1989).

79. Margaret R. Somers, *The “Misteries” of Property*, in *EARLY MODERN CONCEPTIONS OF PROPERTY*, *supra* note 77, at 62, 63.

80. TAYLOR, *supra* note 78, at 11–13.

81. *E.g.*, WOODRUFF D. SMITH, *CONSUMPTION AND THE MAKING OF RESPECTABILITY, 1600–1800*, at 25–26 (2002). Smith documents a consumer revolution that began in the seventeenth century and burgeoned in the eighteenth century, characterized by changes in the quantity and types of consumer goods available. *Id.* at 6. As a result of changing culture and new patterns of trade, Europeans began consuming in new ways. *Id.* at 6–8. For Smith, newfound buying power of laborers was connected to civil rights—and autonomy—which in turn provided motives to consume in order to further class and status distinctions and to emulate peers and superiors. *Id.* at 8.

82. DAVID HUME, *A TREATISE OF HUMAN NATURE* 309 (L.A. Selby-Bigge ed., Oxford, Clarendon Press 1888) (1739) (“[T]he relation, which is esteem’d the closest, and which of all others produces most commonly the passion of pride, is that of *property*.”).

83. *Id.* at 375 (“‘Tis evident we must receive a greater or less satisfaction or uneasiness from reflecting on our own condition and circumstances, in proportion as they appear more or less fortunate or unhappy, in proportion to the degrees of riches, and power, and merit, and reputation, which we think ourselves possess of. Now as we seldom judge of objects from their intrinsic value, but form our notions of them from a comparison with other objects; it follows, that according as we observe a greater or less share of happiness or misery in others, we must make an estimate of our own, and feel a consequent pain or pleasure.”).

84. Rudmin, *supra* note 43, at 49.

pointing to ostentatious display of wealth as the basis for the desirability of luxury goods.<sup>85</sup>

In offering a counterpoint to Locke's story of the emergence of property from the state of nature, another Enlightenment figure, Rousseau, in his *Discourse on Inequality* associated the development of property less with labor removing the fruits of the earth from the commons, and more with the spiraling effects of artificial desire. As noted at the outset, to Rousseau property invoked "the burning passion to increase one's relative fortune less out of real need than to make oneself superior to others."<sup>86</sup> To Rousseau, then, the comparative urge was at the very heart of what property meant.<sup>87</sup>

Hume's close friend Adam Smith started with a sense of the role of property similar to that of Hume and Rousseau, but was more sanguine about what this comparative urge would produce. Indeed, it is fair to say that Smith identified the desire for comparative status as the engine of individual accumulation and the foundation of modern capitalism. Thus, in his *Theory of Moral Sentiments*, Smith wrote:

It is because mankind are disposed to sympathize more entirely with our joy than with our sorrow, that we make parade of our riches, and conceal our poverty. Nothing is so mortifying as to be obliged to expose our distress to the view of the public, and to feel, that though our situation is open to the eyes of all mankind, no mortal conceives for us the half of what we suffer. Nay, it is chiefly from this regard to the sentiments of mankind, that we pursue riches and avoid poverty.<sup>88</sup>

Smith also recognized that status through material possessions tends to reflect an ever-shifting baseline of necessity and desire. As Smith put it, "necessaries [are] not only the commodities which are indispensably necessary for the support of life, but whatever the custom of the country renders it indecent for creditable people, even of the lowest order, to be without."<sup>89</sup>

In the middle of the nineteenth century as the Industrial Revolution was reaching its early apex in Europe, both Karl Marx and John Stuart Mill would hearken back to Rousseau's concern with the pernicious effects of status signaling in property. "When once the means of living have been obtained," Mill wrote, "the far greater part of the remaining labour and effort which takes place on the earth, has for its object to acquire the respect or the

85. *Id.*

86. ROUSSEAU, *supra* note 1, at 66.

87. Rousseau's story of the corrupting influence of property in destroying what he considered to have been an idyllic state of nature may be as implausible (and ahistorical) as the story on which Locke based his labor theory, but it can be seen as a marker that captures a historically important perspective on property nonetheless. Thomas Hobbes had a similar view of the role of relative status in property, arguing that the "passion for power included the desire for riches, and this passion was insatiable since men would always compare themselves with others and strive for superiority." Rudmin, *supra* note 43, at 15 (discussing Hobbes).

88. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 70 (London, George Bell & Sons 1875) (1759).

89. 2 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 869–70 (R.H. Campbell et al. eds., Clarendon Press 1976) (1776).

favourable regard of mankind . . . .”<sup>90</sup> Mill likewise observed that “a great portion of the expenses of the higher and middle classes in most countries . . . [is incurred] from regard to opinion.”<sup>91</sup> All this, to Mill, led to wasteful expenditure on luxuries, which he concluded should be taxed.<sup>92</sup>

To Marx, private property—or, more specifically, “bourgeois” private property—was the basis for and the product of the reification of social power, defining what separated the classes.<sup>93</sup> Marx was sensitive to comparative signaling through property, noting that a “house may be large or small; as long as the neighboring houses are likewise small, it satisfies all social requirements for a residence. But let there arise next to the little house a palace, and the little house shrinks to a boat.”<sup>94</sup> Marx, of course, went far beyond Millian tinkering, arguing that private property should be abolished.<sup>95</sup>

Although this brief review can only hint at the breadth of early property thinkers’ engagement with status signaling,<sup>96</sup> one final social observer bears mention for his work setting much of the terms of our contemporary discourse. In 1899, at the height of the Gilded Age, Thorstein Veblen published his *Theory of the Leisure Class*.<sup>97</sup> Tilting against conventional economic views of private property (then and now), Veblen challenged the proposition that the “economically legitimate end of acquisition” is consumption, both to serve “the consumer’s physical wants” and, indirectly, his “spiritual, aesthetic, intellectual” and other “so-called higher wants.”<sup>98</sup> Rather, Veblen argued, incentives for striving and producing come not from the needs

90. JOHN STUART MILL, THREE ESSAYS ON RELIGION 87 (photo. reprint 1962) (1874).

91. JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 869 (W.J. Ashley ed., Longmans, Green, and Co. 1909) (1848).

92. *Id.*

93. KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY 24–25 (Friedrich Engels ed., Int’l Publ’rs 1933) (1848).

94. McAdams, *supra* note 13, at 11 n.30 (quoting KARL MARX, WAGE-LABOUR AND CAPITAL 33 (Int’l Publ’r 1976) (1849)).

95. MARX & ENGELS, *supra* note 93, at 23–25.

96. See generally McAdams, *supra* note 13, at 11–12 & n.30 (also citing, for example, JOHN RAE, THE NEW PRINCIPLES OF POLITICAL ECONOMY (1834), *reprinted in* SOCIOLOGICAL THEORY OF CAPITAL (Charles W. Mixter ed., 1905) for identifying social waste associated with “vanity,” and Alfred Marshall, the progenitor of modern demand theory, who examined the “power and prevalence of the human desire for ‘distinction’”); Rudmin, *supra* note 43, at 54 (noting Herbert Spencer’s discussion of the role of property as a “ceremonial institution” through which trophy possessions “give to their owner some influence over those around him” (citing 2 HERBERT SPENCER, PRINCIPLES OF SOCIOLOGY 36 (1879))).

97. VELEN, *supra* note 17. Veblen’s theories have generated a vast literature, some of which is explored below. Veblen has been attacked on several fronts—for misunderstanding the nature of status consumption, underestimating individual agency in consumption decisions, and oversimplifying status relations, among others. See Juliet B. Schor, *In Defense of Consumer Critique: Revisiting the Consumption Debates of the Twentieth Century*, 611 ANNALS AM. ACAD. POL. & SOC. SCI. 16, 19–21 (2007). Veblen’s insights into the status-related nature of property, however, remain deeply influential.

98. VELEN, *supra* note 17, at 22.

associated with consumption, but instead from what he called “emulation.”<sup>99</sup> Thus the drive to create “invidious distinction”<sup>100</sup> that is expressed through property, Veblen concluded, has always predominated over any subsistence-related necessity.<sup>101</sup>

From the argument that invidious distinction lies at the heart of property, Veblen then turned to the mechanisms through which that distinction is established and maintained. In modern industrial society, wealth becomes a proxy for esteem, which is then internalized by the holders of wealth as an element of self-respect.<sup>102</sup> Since comparisons are made to “others with whom” a person “is accustomed to class himself,” as soon as a given comparative status is achieved the status ceases to grant the satisfaction of superiority, generating a cycle of comparison.<sup>103</sup> Central to this cycle is “conspicuous consumption,” the visible ritual of possessing and using those objects that signify relatively higher status (particularly the consumption of unnecessary goods and services),<sup>104</sup> and Veblen argued that the cycle is evident not just among the so-called “leisure class,” but as an aspect of consumption and the standard of living at every level of society.<sup>105</sup>

From a surprisingly long line of early modern thinkers, then, a picture of property emerges that is unfamiliar in the contemporary legal literature. This vision situates property as an institution through which a constant process of competition and status anxiety plays out, with the accumulation and display of property serving as a driving incentive for economic activity, and the risk of status loss requiring constant response. Some commentators saw this as deeply disturbing; others, inevitable and perhaps even essential. This vision may not be in the mainstream of legal property thought today, but in a number of other fields, it continues to generate a complex, active literature.

### B. *Contemporary Perspectives on Status Signaling, Hierarchy, and Property*

Moving to contemporary scholarship, a number of related fields offer insights that give theoretical depth and empirical support to the long-standing

99. *Id.* (“The motive that lies at the root of ownership is emulation; and the same motive of emulation continues active in the further development of the institution to which it has given rise and in the development of all those features of the social structure which this institution of ownership touches.”).

100. *Id.*

101. *Id.* at 23 (“Ownership began and grew into a human institution on grounds unrelated to the subsistence minimum. The dominant incentive was from the outset the invidious distinction attaching to wealth, and, save temporarily and by exception, no other motive has usurped the primacy at any later stage of the development.”).

102. *Id.* at 25.

103. *Id.*

104. *Id.* at 49–72.

105. *Id.* at 58–59. Veblen noted two related processes: invidious comparison, in which consumption is used to mark higher status, and “pecuniary emulation,” in which consumption is used to signal upward mobility. *Id.* at 25–26.

intuition that property plays an important role in signaling status. The general understanding that emerges from this literature has three central components. First, as sociologists have emphasized, people understand their world at least in part through interaction with others, with property playing a particularly important role in this communicative process. Second, social psychologists have done extensive work on the process through which people compare themselves to others, with property again playing an important role in that comparison. Finally, economists have explored the often negative effects of the status races that develop around the resulting interpersonal comparisons through property. This Section explores each of these related lines of inquiry in turn.<sup>106</sup>

### 1. *Property as Communication*

To start to unpack the way property signals status, it is necessary to have an account of how individuals relate to, and through, property on a symbolic level. This, in turn, requires an explanation of how and what property—in the sense of the stuff of the world—communicates.<sup>107</sup> Many disciplines, particularly anthropology<sup>108</sup> and semiotics,<sup>109</sup> have explored the role of various sorts of possessions in communication, but certain strains of sociology and social psychology offer particularly rich vocabularies to understand this phenomenon.

Emile Durkheim, in *The Elementary Forms of Religious Life*, argued that possessions are among the many symbols given meaning through social rituals.<sup>110</sup> Durkheim's exploration of the sociology of symbols prefigured the modern field of symbolic interactionism, which has developed a fuller vocabulary through which to understand how individuals mediate social meaning through external objects.<sup>111</sup> This perspective starts with the

106. The literature offers a number of explanations for what generates the comparative drive in general. See, e.g., FRANK, *supra* note 41, at 21–26; Oliver Goodenough, *Values, Mechanism Design, and Fairness*, in *MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY* 13 (Paul J. Zak ed., 2007); BELL HOOKS, *WHERE WE STAND: CLASS MATTERS* (2000). For present purposes, it is sufficient to recognize the existence of the comparative drive in contemporary American culture—with some emphasis on the psychological and social psychological aspects of the phenomenon.

107. See Rudmin, *supra* note 43, at 3 (“Property is a form of symbolic expression. A person’s material possessions communicate personal and social information, dependent on cultural norms of interpretation.”); see also Rose, *supra* note 4, at 5 (noting that “the proper study of property is communication, rhetoric, language”).

108. See DOUGLAS & ISHERWOOD, *supra* note 5, at 59 (“It is standard ethnographic practice to assume that all material possessions carry social meanings and to concentrate a main part of cultural analysis upon their use as communicators.”).

109. See generally ROLAND BARTHES, *ELEMENTS OF SEMIOLOGY* (Annette Lavers & Colin Smith trans., Hill and Wang 1967) (1964); Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 521–24 (2006).

110. Rudmin, *supra* note 43, at 53 (discussing EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* (Joseph Ward Swain trans., George Allen & Unwin, Ltd. 1915) (1912)).

111. Landmark works in the symbolic interactionist literature include HERBERT BLUMER, *SYMBOLIC INTERACTIONISM: PERSPECTIVE AND METHOD* (1969); ERVING GOFFMAN, *THE*



seemingly basic proposition that it is through processing interactions with external objects and other people that individuals develop their sense of self and their understanding of the world. As described by Herbert Blumer, a disciple of the sociologist and social psychologist George Herbert Mead, people “act toward things on the basis of the meanings that the things have for them.”<sup>112</sup>

This meaning is neither fixed and inherent on the one hand, nor entirely subjective on the other, but rather derives from social interactions and an interpretative process that grows out of those interactions. Accordingly, central to this view is an understanding of individual behavior that reflects a middle line between external forces such as social position and group affiliation and internal forces such as the subconscious. Mead, Blumer, and others in this tradition concluded that how people act in the world flows from “what lies in between, a reflective and socially derived interpretation of the internal and external stimuli that are present.”<sup>113</sup>

Charles Horton Cooley, another important source for modern interactionism, argued that our sense of self results in part from how we conceive of our perceptions in the eyes of others, what Cooley famously called the “looking-glass” self.<sup>114</sup> To Cooley, our identities reflect how the messages we send about ourselves are reflected back in the reaction of others, specifically, “the imagination of our appearance to the other person; the imagination of his judgment of that appearance, and some sort of self-feeling, such as pride or mortification.”<sup>115</sup> The modern descendants of Mead and Cooley have emphasized that our sense of self is formed in no small measure by the process of understanding deeply embedded social interactions.<sup>116</sup>

The role of material objects as sites for developing this meaning has been a central aspect of symbolic interactionist theory since the outset.<sup>117</sup> When Blumer referred to “things,” he had in mind much more than just property, yet a line of symbolic interactionists have explored the particular

---

PRESENTATION OF SELF IN EVERYDAY LIFE (1959); and BERNARD N. MELTZER ET AL., *SYMBOLIC INTERACTIONISM: GENESIS, VARIETIES AND CRITICISM* (1975). Symbolic interactionism has its roots in the sociological writings of Max Weber and the philosophy of George Herbert Mead, with their mutual emphasis on both the social process and the subjective meaning of human behavior. As discussed below, similar roots underpin the social psychological literature on social comparison. See *infra* Section II.B.2.

112. BLUMER, *supra* note 111, at 2. As Blumer wrote, meaning is interactive—is a social product—in that the “meaning of a thing for a person grows out of the ways in which other persons act toward the person with regard to the thing.” *Id.* at 4.

113. MELTZER ET AL., *supra* note 111, at 2.

114. CHARLES HORTON COOLEY, *HUMAN NATURE AND THE SOCIAL ORDER* 168–210 (Transaction Books 1983) (1902).

115. *Id.* at 184.

116. See DITTMAR, *supra* note 55, at 65–94.

117. See BLUMER, *supra* note 111, at 10–11 (discussing the nature of objects—physical and abstract—that form the basis for symbolic interaction); E. Doyle McCarthy, *Toward a Sociology of the Physical World: George Herbert Mead on Physical Objects*, 5 *STUD. SYMBOLIC INTERACTION* 105 (1984).

nature of symbolic communication through the more conventional sense of "things."<sup>118</sup> As Grant McCracken has argued, tangible property is "an unusually cunning and oblique device for the representation of fundamental cultural truths."<sup>119</sup>

Property serves this role in establishing meaning by transmitting significant amounts of social and cultural information that would be difficult to communicate directly.<sup>120</sup> In consumer studies, for example, empirical work has identified the signals that a variety of consumer products send.<sup>121</sup> A number of scholars have explored the communicative—and particularly status-communicative—aspects of clothing,<sup>122</sup> cosmetics,<sup>123</sup> homes,<sup>124</sup> offices,<sup>125</sup> and a variety of other common types of property.<sup>126</sup> Empirical work, moreover, has demonstrated the variety of interconnected messages that possessions signal. One comparative international study, for example, suggested that there are connections between perceptions of wealth and perceptions of the amount of control a person is able to assert (a direct correlation) or how warm a person is (an inverse correlation).<sup>127</sup>

A consistent theme in this literature is the ability of objects and sets of objects to transmit information that is clearly understood by recipients, underscoring the symbolic-interactionist insight that consensus about social meaning has wide salience.<sup>128</sup> And if people form their identity through

118. Cf. Russell W. Belk, *Assessing the Effects of Visible Consumption on Impression Formation*, 5 ADVANCES CONSUMER RES. 39, 39 (1978) ("The belief that a person's possession and expenditures reveal something about the person may be one of the strongest cultural universals affecting consumer behavior. In virtually all cultures, visible products and services are the bases for inferences about the status, personality, and disposition of the owner or consumer of these goods.").

119. McCracken, *supra* note 76, at 68; see also Andrew N. Christopher et al., *Materialism and self-presentational styles*, 38 PERSONALITY & INDIVIDUAL DIFFERENCES 137 (2005).

120. Cf. DITTMAR, *supra* note 55, at 65 (citing survey evidence for the proposition that "the symbolic aspects of possessions are more important than their practical functions").

121. A number of consumer scholars have explored the Jamesian link between possessions and the "extended self" in the consumer culture context. E.g., Aaron C. Ahuvia, *Beyond the Extended Self: Loved Objects and Consumers' Identity Narratives*, 32 J. CONSUMER RES. 171 (2005); Eric J. Arnould & Craig J. Thompson, *Reflections, Consumer Culture Theory (CCT): Twenty Years of Research*, 31 J. CONSUMER RES. 868 (2005); Russell W. Belk, *Possessions and the Extended Self*, 15 J. CONSUMER RES. 139 (1988); Hope Jensen Schau, *Consumer Imagination, Identity and Self-expression*, 27 ADVANCES CONSUMER RES. 50 (2000); Michael R. Solomon, *The Role of Products as Social Stimuli: A Symbolic Interactionism Perspective*, 10 J. CONSUMER RES. 319 (1983).

122. E.g., Gregory P. Stone, *Appearance and the Self*, in HUMAN BEHAVIOR AND SOCIAL PROCESSES: AN INTERACTIONIST APPROACH 86 (Arnold M. Rose ed., 1962).

123. E.g., Angela Chao & Juliet B. Schor, *Empirical tests of status consumption: Evidence from women's cosmetics*, 19 J. ECON. PSYCHOL. 107 (1998).

124. E.g., Edward K. Sadalla et al., *Identity Symbolism in Housing*, 19 ENV'T & BEHAV. 569, 572–73, 583–86 (1987).

125. E.g., Samuel D. Gosling et al., *A Room With a Cue: Personality Judgments Based on Offices and Bedrooms*, 82 J. PERSONALITY & SOC. PSYCHOL. 379 (2002).

126. E.g., Americus Reed II, *Activating the Self-Importance of Consumer Selves: Exploring Identity Salience Effects on Judgments*, 31 J. CONSUMER RES. 286, 293 (2004).

127. Helga Dittmar et al., *Fine feathers make fine birds: a comparative study of the impact of material wealth on perceived identities in England and Italy*, 4 SOC. BEHAV. 195 (1989).

128. See DITTMAR, *supra* note 55, at 10.

material possessions, the converse is also true: people form understandings of others' identities at least in part in the same way.<sup>129</sup>

A related insight, one particularly important for considering the role of law in status signaling through property, is that symbolic interaction through material objects can be manipulated.<sup>130</sup> Erving Goffman identified a myriad of ways that people engage in what he called "impression management."<sup>131</sup> A central aspect of this process involves deliberate manipulation of the messages that possessions and other outward aspects of the self send. Using a theatrical metaphor to explore the role of performance in everyday life, Goffman argued that individuals manage their "stage" and the "props" they use, as well as the messages communicated to the "audience" of larger society.<sup>132</sup> These messages require consensus about meaning, but, as Goffman suggested, that consensus is not static, can be consciously directed, and often is reached through possessions and place.<sup>133</sup>

## 2. *Development of Self by Reference to Others*

If symbolic interactionism provides a vocabulary to help understand how individuals communicate through material objects, the next step is understanding what, exactly, is communicated and how such information is received. Social psychologists have built upon a similar sensitivity to the socially constructed nature of identity and the importance of material possessions to the formation of identity through interpersonal comparisons.<sup>134</sup> In 1954, Leon Festinger launched the field of social-comparison theory with his seminal *Theory of Social Comparison Processes*.<sup>135</sup> In the article, Festinger began with the proposition that individuals evaluate their own opinions and abilities to improve their chances of survival.<sup>136</sup> Wherever possible, Festinger argued, individuals look to relatively concrete indicators to evaluate these aspects of self.<sup>137</sup> However, objective standards are inherently limited in many situations, and are entirely unavailable for many important

---

129. See *id.* at 88–92.

130. Cf. Grant McCracken, *Culture and Consumption: A Theoretical Account of the Structure and Movement of the Cultural Meaning of Consumer Goods*, 13 J. CONSUMER RES. 71 (1986). McCracken explores the "alienable, moveable, manipulable quality" of the meaning of consumer goods. *Id.* at 81.

131. GOFFMAN, *supra* note 111, at 208.

132. *Id.* at 22–30, 51–58.

133. Cf. *id.* at 228–55 (discussing the conscious process of staging to express the self and the social dialectic in which that presentation occurs).

134. For some recent important works in this literature, see, for example, SOCIAL COMPARISON AND SOCIAL PSYCHOLOGY (Serge Guimond ed., 2006), and SOCIAL COMPARISON: CONTEMPORARY THEORY AND RESEARCH (Jerry Suls & Thomas Ashby Wills eds., 1991).

135. Leon Festinger, *A Theory of Social Comparison Processes*, 7 HUM. REL. 117 (1954).

136. *Id.* at 118; see also Jerry M. Suls, *Social Comparison Theory and Research: An Overview from 1954*, in SOCIAL COMPARISON PROCESSES 1, 3 (Jerry M. Suls & Richard L. Miller eds., 1977).

137. Festinger, *supra* note 135, at 118–19.

personal traits, such as political opinions and social status.<sup>138</sup> Thus, individuals look to others to assess their own abilities, yielding a constant process of social comparison to evaluate abilities and opinions in most circumstances.<sup>139</sup> In short, people seek to understand themselves and their place in the world at least in part by comparing themselves to others.

In the more than half-century since Festinger's article, scholars have elaborated in great depth on the underpinnings of this theory. For example, it is widely understood that people often choose a comparator they perceive as salient—particularly relevant and similarly situated.<sup>140</sup> Moreover, some people choose to compare themselves to those whom they perceive to have higher status on any given criterion, which has been labeled “upward comparison.”<sup>141</sup> Conversely, particularly when self-esteem is threatened, individuals may choose instead to make a “downward comparison,” comparing themselves with someone they perceive as inferior on a given characteristic.<sup>142</sup> This subsequent scholarship adds the psychology of self-enhancement to Festinger's focus on self-evaluation.<sup>143</sup> Social comparison thus does not necessarily translate into social conformity, and comparison may occur just as much to bolster uniqueness as to find a place in a cultural context.<sup>144</sup>

People engage in this comparative exercise to gauge many personal characteristics, but central types of comparison often involve people's standing in a variety of hierarchies. This hierarchical positioning is not simply determined by wealth or income in American culture, but instead can take place through any number of other variables. Although in popular language, we still talk about the upper class, the middle class, and the working class,<sup>145</sup>

138. *Id.*

139. *Id.*

140. See Dale T. Miller & Deborah A. Prentice, *The Construction of Social Norms and Standards*, in *SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES* 799 (E. Tory Higgins & Arie W. Kruglanski eds., 1996). Thus, people tend to compare themselves to people who are similar enough to make the comparison meaningful.

141. Ladd Wheeler, *A Brief History of Social Comparison Theory*, in *SOCIAL COMPARISON: CONTEMPORARY THEORY AND RESEARCH*, *supra* note 134, at 3, 9–10.

142. *Id.*

143. Recent scholarship in this field has also highlighted group dynamics in status comparisons, underscoring that comparisons play out not only in terms of individual characteristics, but also in terms of the perceived characteristics of groups with which people self-identify. See, e.g., Alison Ledgerwood et al., *Group-Identity Completion and the Symbolic Value of Property*, 18 *PSYCHOL. SCI.* 873, 873 (2007) (arguing that “property derives value from its capacity to serve as an effective means in the pursuit of group-identity goals”). See generally *SOCIAL COMPARISON AND SOCIAL PSYCHOLOGY*, *supra* note 134.

144. See Jonah Berger & Chip Heath, *Where Consumers Diverge from Others: Identity Signaling and Product Domains*, 34 *J. CONSUMER RES.* 121 (2007) (discussing the differentiation and uniqueness literature in psychology and consumer research).

145. The *New York Times*, for example, recently ran an extended series entitled *Class Matters*, which divided Americans into the “Top Fifth,” the “Upper Middle,” the “Middle,” the “Lower Middle,” and “Bottom Fifth,” exploring four “commonly used criteria for gauging class,” specifically occupation, education, income, and wealth. See, e.g., Janny Scott & David Leonhardt, *Class in America: Shadowy Lines That Still Divide*, *N.Y. TIMES*, May 15, 2005, at A1. This series was

few subscribe to anything resembling the early Marxist view of strict boundaries and inherent conflicts between a few well-defined classes. That is not to say that economic status is not still one of the most important dividing lines in our society, but hierarchy in American culture is much more complex.

As sociologists have explored, there are a number of micro-hierarchies that reflect a host of status determinants.<sup>146</sup> Max Weber identified three basic axes along which social stratification occurs, dividing up stratification into economic, prestige, and power elements.<sup>147</sup> As Weber emphasized, status on one dimension does not necessarily equate to status on another dimension, and in contemporary culture, the range of positional ladders that offer ways of differentiating individuals have become much more complex than the threefold schema Weber outlined. People today jockey for position based on education, physical traits, associations, political power, cultural capital, and any number of other determinants of hierarchy.<sup>148</sup> Nonetheless, property and all that comes along with it remain central to many hierarchies, and increasingly so given the importance of consumption to modern identity.<sup>149</sup>

Property, then, plays an important role in making relevant comparisons—both status related and otherwise—for reasons that parallel the power of property in the symbolic interactionist literature.<sup>150</sup> People generally have a detailed sense of what gives particular objects significance, and property conveys a great deal of information that most people deem relevant to self-evaluation and self-enhancement. Possessions are accordingly used to signal both superiority (what I own sets me apart from those with lower status) and the desire to emulate those perceived to be superior (what I own is just like what elites own).<sup>151</sup>

---

controversial for its treatment of several matters but gives a strong indication of where mainstream thinking about class is today.

146. See Roger V. Gould, *The Origins of Status Hierarchies: A Formal Theory and Empirical Test*, 107 AM. J. SOC. 1143, 1143 (2002) (“[A]cross a wide range of scales and contexts, actors are sorted into social positions that carry unequal rewards, obligations, and expectations.”).

147. MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 428–29 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., The Free Press 1997) (1915). It is interesting to note that Weber cited Veblen in his work on status, particularly for the connection between status and coercive power represented through property. See Rudmin, *supra* note 43, at 51 (discussing Weber and Veblen).

148. At a community level, public, nonprofit, or prominent private properties (such as museums or ever-taller skyscrapers) can have status dynamics associated with them. Public works are often explicitly about community status, with communities touting the biggest building, the biggest bridge, the best performing arts center, and the like.

149. See generally PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* (1984) (discussing the taste/consumer preference-status connection); Lewis Friedland et al., *Capital, Consumption, Communication, and Citizenship: The Social Positioning of Taste and Civic Culture in the United States*, 611 ANNALS AM. ACAD. POL. & SOC. SCI. 31 (2007).

150. Cf. Marsha L. Richins, *Social Comparison, Advertising, and Consumer Discontent*, 38 AM. BEHAV. SCIENTIST 593 (1995).

151. Cf. Niklas Karlsson et al., *Social Comparison and Consumer Behavior: When Feeling Richer or Poorer Than Others Is More Important Than Being So*, 35 J. APPLIED SOC. PSYCHOL. 1206, 1219–21 (2005).

Social-comparison theory in some ways gives a neutral and technical face to envy, one of the seven deadly sins.<sup>152</sup> But by recognizing the deep-seated nature of the drive to compare and the self- and group-regulating mechanisms that play out through this drive, social-comparison theory has proven a remarkably fruitful body of scholarship.<sup>153</sup> The theory underscores that there are a wide variety of hierarchical scales at work in most social and cultural contexts, that most people have at least some instinct to internalize those scales, and that property in all of its forms stands as a particularly rich marker for comparison.

### 3. Positional Goods and the Economics of Status Races

If sociology and social psychology provide descriptions of how and why people use property to signal relative status, economists have added interesting work on the consequences of the resulting status races.<sup>154</sup> There has long been a grain in economic thinking that highlights the nature of demand as driven by a regard for others, what McAdams calls an aspect of “relative preferences.”<sup>155</sup> This is often associated with Veblen’s conspicuous consumption, but it has deeper roots and wider consequences.<sup>156</sup>

As Robert Frank has argued, a great many of the “prizes in life” are positional—“sought after less because of any absolute property they possess than because they compare favorably with others in their own class.”<sup>157</sup> Frank, reflecting social-comparison insights on salience, notes that there is a basic motivating mechanism that drives people to make local, as opposed to

---

152. Cf. John Sabini & Maury Silver, *Envy*, in *THE SOCIAL CONSTRUCTION OF EMOTIONS* 167, 172 (1986) (asserting that all status is inherently comparative).

153. As noted above, some scholars have rooted comparative drives in biological factors as well as social factors, but it is unnecessary to identify the source of this drive to acknowledge its existence and relevance. See *supra* note 106.

154. Although McAdams argued that recognition of status relations stood outside the mainstream of economics, and thus law and economics, see McAdams, *supra* note 13, there has been much renewed interest in this topic, see, e.g., Laurie Simon Bagwell & B. Douglas Bernheim, *Veblen Effects in a Theory of Conspicuous Consumption*, 86 AM. ECON. REV. 349, 349 n.1 (1996) (outlining research on “prestige” and “status” goods); Bill Dupor & Wen-fang Liu, *Jealousy and Equilibrium Overconsumption*, 93 AM. ECON. REV. 423 (2003); Gertrud M. Fremling & Richard A. Posner, *Status Signaling and the Law, with Particular Application to Sexual Harassment*, 147 U. PA. L. REV. 1069, 1070–75 & n.2 (1999).

155. McAdams, *supra* note 13, at 7–10.

156. Within economics, a focus on comparative demand is often traced to JAMES S. DUESENBERY, *INCOME, SAVING AND THE THEORY OF CONSUMER BEHAVIOR* (1949), which developed an early theory of consuming and saving that focused on individual decisions tied to general levels of consumption and saving in society. Even earlier explorations can be traced to A.C. Pigou, *The Interdependence of Different Sources of Demand and Supply in a Market*, 23 ECON. J. 19 (1913), which stated: “As regards demand, the essential matter is that people do, in fact, desire many things, not merely for their own sake, but, in the main, on account of the reputation or distinction which the possession of them confers.” *Id.* at 20.

157. FRANK, *supra* note 41, at 7 (citing FRED HIRSCH, *SOCIAL LIMITS TO GROWTH* (1976), for the term “positional goods”).

distant, comparisons in evaluating positional goods.<sup>158</sup> This competitive dynamic can generate what Frank calls a “positional treadmill,” a prisoner’s dilemma in which goods (in the broad economics sense) that do not satisfy relative preferences will tend to be under-consumed as people skew toward goods that better signal position.<sup>159</sup>

To translate this into terms more familiar in property literature, one can think about conspicuous consumption and status races around property as a form of the tragedy of the commons.<sup>160</sup> As with other such “tragedies,” there is a resource—goods that contribute to relative status—which would be collectively rational to consume at levels lower than what would occur when people instead make individual decisions about their level of consumption. If all consumers of positional goods could solve the coordination problems inherent in needing to establish and reinforce hierarchies in this way, there would be no need to use such goods to signal relative status, and the level of consumption of positional goods would drop. But for a variety of reasons—some in the practical transaction-cost vein that economists have highlighted, but many social and cultural—people do not generally coordinate around status signaling.

Status races around positional goods generate observable consequences for behavior connected to property.<sup>161</sup> For example, satisfying demand for positional goods creates a conflict between consumption and saving. This was first explored in depth by James Duesenberry, who argued that the only way to account for the fact that savings rates are higher at higher levels of income is the fact that people at the lower end of the socioeconomic spectrum must invest in more status-related goods as a percentage of their income.<sup>162</sup> This has been challenged by life-cycle and permanent-income hypotheses, but a good argument can be made that such alternative accounts are less convincing.<sup>163</sup>

A similar—and more property-specific—argument along the same lines was recently offered by Luis Rayo and Gary Becker, who asserted that

---

158. *Id.* at 17–38. Frank notes that individuals can game local status races by choosing a different “league” in which to compete—choosing to be a bigger frog in a comparatively smaller pond, to use his metaphor. But Frank highlights the obvious costs of such status-related moves and from this observation argues that an implicit market for relative status (purchasers having relatively higher status and sellers having relatively lower status) operates in many situations.

159. *Id.* at 136–37.

160. See ROBERT FRANK, LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS 207 (1999) (likening the incentives resulting from conspicuous consumption with those creating excess pollution). British economist Richard Layard has made an even more explicit link between relative inequality and the tragedy of the commons. See RICHARD LAYARD, HAPPINESS: LESSONS FROM A NEW SCIENCE 35 (2005).

161. Empirical work supports the status-seeking predicates of what Juliet Schor has described as the Veblenian account of consumption. See Robert L. Basmann et al., *A Note on Measuring Veblen’s Theory of Conspicuous Consumption*, 70 REV. ECON. & STAT. 531, 534 (1988) (drawing post-World War II commodity-expenditure data for empirical support); Chao & Schor, *supra* note 123, at 108; Schor, *supra* note 97, at 16.

162. DUSENBERRY, *supra* note 156, at 29–32, 45.

163. See FRANK, *supra* note 41, at 146–49 (discussing these theories).

goods that have more obvious status-related attributes tend to be durable.<sup>164</sup> Durable goods tend to require more borrowing, leading to excessive debt and less financial savings.<sup>165</sup> The common intuition behind these observations is that positional goods skew decisions toward things that can better reinforce status, regardless of utility. As we shall see, this adds an important conceptual point to understanding how status signaling changes conceptions of the work of property.

### C. Synthesis and Reflections

Historical and contemporary interdisciplinary perspectives on status signaling through property suggest the outlines of a general theoretical framework. This Section provides a synthesis and further details of that framework and then notes some questions this perspective might raise.

#### 1. The Boundaries of Status Signaling Through Property

What emerges from the preceding discussion is a vision of the work of property grounded in several core assumptions about human nature and social organization. Social interaction gives symbolic meaning to the material world, with people constantly sending and receiving messages about property. People form their sense of self at least in part by comparison to others, with property serving as a particularly important and informational metric for that comparison. And this comparative process around property generates status races that influence many aspects of how people interact with and through property.

This construct brings to the fore the ubiquitous role that property plays in marking, defining, and policing status boundaries. As Goffman noted, the “universal characteristic” of status differentiation is that it requires “adequate communication.”<sup>166</sup> Property provides a particularly powerful symbolic language for this communication, with the status-related aspects of property presenting a communicative structure that is adaptive, culturally sensitive, and generally pervasive.<sup>167</sup> And in our consumer culture,

---

164. Luis Rayo & Gary S. Becker, *Peer Comparisons and Consumer Debt*, 73 U. CHI. L. REV. 231 (2006). For further discussion of the nature of durable goods in status comparisons, see *infra* text accompanying notes 174–76.

165. Rayo & Becker, *supra* note 164, at 232.

166. Erving Goffman, *Symbols of Class Status*, 2 BRIT. J. SOC. 294, 294 (1951); see also William H. Form & Gregory P. Stone, *Urbanism, Anonymity, and Status Symbolism*, 62 AM. J. SOC. 504 (1957) (exploring Goffman’s communication structure across varying social settings).

167. While status may be a particularly noteworthy category of information that property communicates, it is by no means the only message. For example, purchasing and driving a Prius may send a kind of hierarchical message (“I’m more environmentally conscious than Hummer drivers are”), but it also sends messages about environmental consciousness, comfort with technology, and the like. Likewise, an SUV may signal wealth in general terms (and some models more than others) but, to some consumers, it also represents sportiness, a love of the outdoors, or safety consciousness. This variety of messages can hold true for types property beyond large-scale consumer items.



information relating to property is all the more intense because of a variety of cultural and market institutions generating and reinforcing that information. Everything from magazines and entire cable channels devoted to shopping to the internet to the pervasive advertising that saturates so much of our daily lives revolves around communication through material goods. We are bombarded by messages about property, and there is evidence that we internalize those messages from an early age.<sup>168</sup>

Property is a particularly important locus for comparative communication, moreover, because so many aspects of property can be imbued with status. Economists have explored so-called “status” or “prestige” goods, examining when an element of the price consumers are willing to pay reflects the status-reinforcing messages associated with a given good.<sup>169</sup> Harvey Leibenstein famously broke down the elements of consumer demand shaped by others into three variations. First, what he labeled “bandwagon effects” reflect a desire to wear, buy, do, consume, and behave like peers, with the consumer intending to emulate other owners of the product.<sup>170</sup> Here, the more people who are perceived to want a product, the more desirable a product becomes. Next, “snob effects” conversely reflect consumer demand related to the perceived rarity of the product—the harder an object is to obtain (because it is hard to make, more expensive to buy, or the like), the higher the price premium associated with the object, independent of any underlying functionality.<sup>171</sup> Finally, “Veblen effects” provide a catchall category for generic conspicuous consumption, where demand for a product increases as its perceived status increases.<sup>172</sup>

Although economists tend to put this third category into something of a black box, there is much depth and texture to the details through which property can confer perceived status. Of course, some things are seen as prestigious for their inherent attributes—the largest car, the smallest radio. And, on some level, quality may be a sign of status.<sup>173</sup> Indeed, the very durability of so much of property reinforces its centrality in communicating status.<sup>174</sup> This can be tied to physical durability—the fact that a house or fine clothing lasts longer than ephemeral goods magnifies the potential signaling

168. Russell W. Belk et al., *Developmental Recognition of Consumption Symbolism*, 9 J. CONSUMER RES. 4 (1982); see also JULIET B. SCHOR, BORN TO BUY 13, 19 (2004).

169. E.g., Bagwell & Bernheim, *supra* note 154, at 350 (modeling “Veblen effects” as “a willingness to pay a higher price for a functionally equivalent good” due to “the desire to signal wealth”). Veblen himself famously illustrated this phenomenon with the example of silver utensils for eating, which although much more expensive than utensils made of other material, are not any more useful and may be less so. VEBLEN, *supra* note 17, at 85–86.

170. See H. Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand*, 64 Q.J. ECON. 183, 190 (1950).

171. *Id.* at 199.

172. *Id.* at 202–05; Bagwell & Bernheim, *supra* note 154, at 349–50.

173. Conversely, as anthropologists have pointed out, “quality” can simply be a function of objects’ abilities to serve as “rank markers.” DOUGLAS & ISHERWOOD, *supra* note 5, at 117–18.

174. See Rayo & Becker, *supra* note 164, at 232.

effect, all things being equal.<sup>175</sup> It can also be tied to how strong the signal is—as in the case of a particularly memorable meal used to impress neighbors.<sup>176</sup>

Status can attach not only to the quality or functional dimensions of an object but also to its location.<sup>177</sup> The proverbial corner office, for example, may be bigger and have nicer views, but it also has deep cultural significance. So, too, particular neighborhoods or particular areas can take on status salience that has something to do with their physical characteristics, but as much if not more to do with psychology and social dynamics.<sup>178</sup> In Manhattan, this can extend to desirable blocks or even particularly “hot” buildings. Thus, there is a deep link between status and place, which can be a function of proximity or distance, uniqueness, or a particular cultural context.

Cultural meaning can attach to other attributes of property as well. The novelty of a thing, for example, can be a most important status marker—as the lines outside an Apple store before the newest product is released can attest. There may also be an insider/outsider dynamic associated with certain goods, where it is less a resource’s rarity and more its association with certain groups (which can themselves be high or low status) that sends the relevant signal. The spread of hip-hop culture to the suburbs and grunge style both reflect this kind of appropriation of meaning. And some products are desirable precisely because they suggest a resistance to any kind of group identity.<sup>179</sup>

There can also be a status dynamic around perceptions of elite preferences, with status cascading from that perception.<sup>180</sup> Unlike Leibenstein’s snob goods, the status appeal here derives from association with the preferences of those who themselves have status, whether through wealth, celebrity, or other sources of cultural power.<sup>181</sup> Although it is open to debate how successful such associations are, appeals to this kind of linkage have long been, and continue to be, as familiar in advertising as the face on the front of the Wheaties box or behind a wrist wearing a TAG Heuer watch.

Not all property, of course, will signal status in the same way and not all property will even signal.<sup>182</sup> There is empirical evidence that people’s sense

---

175. *Id.*

176. *Id.* at 233–34.

177. Nicholas Blomley, *Landscapes of Property*, 32 *LAW & SOC’Y. REV.* 567 (1998) (discussing the social construction of space).

178. See FRANK, *supra* note 160, at 28–29 (describing premiums commanded in real estate for views and “choice” locations).

179. See Berger & Heath, *supra* note 144.

180. See FRANK, *supra* note 160, at 3–4.

181. Cf. BOURDIEU, *supra* note 149 (discussing the taste-preferences of different social groups).

182. Cf. Fredrik Carlsson et al., *Do You Enjoy Having More than Others? Survey Evidence of Positional Goods*, 74 *ECONOMICA* 586, 590–96 (2007) (describing survey evidence that suggests that some goods, such as income and cars, have more positional value than others, such as leisure and car safety). Indeed, in some communities, there is arguably a negative association between property

of the meaning of their property varies based on gender and age and may vary on racial and ethnic grounds—which is not surprising, given the culturally embedded nature of the meaning of things.<sup>183</sup> One should be careful about being essentialist in reflecting on this evidence, but several studies have shown gender variations in which possessions are most valued and on what basis,<sup>184</sup> as well as significant life-cycle variation.<sup>185</sup>

The distinction, moreover, that economists have drawn between observable and unobservable goods is relevant here: for property to signal it must either be observable or its existence must be readily inferable.<sup>186</sup> But even property that is not directly observable can send proxy signals, as when owning a house in a given neighborhood carries a status signal even for those who never set foot in that neighborhood.<sup>187</sup> Thus, one of the things that is interesting about the signaling effect of place (particularly residence) is that it is mobile: people can use where they live to communicate a wealth of information about themselves without anyone actually directly seeing or experiencing the underlying property. This essentially multiplies the effect of the status signal that certain kinds of property can send.

Part of the particular power of property to signal status in our contemporary culture, finally, is that many other status determinants are generally out of bounds. There are very few taboos as powerful, for example, as not talking (directly) about how much people earn, even though income is one of the most important metrics for evaluating socioeconomic status.<sup>188</sup> And there are deeply engrained habits in most social settings against declaring, at least

---

and status—what might be considered an anti-property attitude, where members of the community who display property too overtly can be ostracized. And, in some cultural contexts giving away property can confer status in much the same way that obtaining and displaying property generally does in our culture.

183. Cf. MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 170 (1993) (discussing the culture of property).

184. E.g., CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 7, at 105–12; Floyd W. Rudmin, *Gender differences in the semantics of ownership: A quantitative phenomenological survey study*, 15 J. ECON. PSYCHOL. 487, 504 (1994).

185. E.g., Lita Furby, *Possessions: Toward a Theory of Their Meaning and Function Throughout the Life Cycle*, 1 LIFESPAN DEVELOPMENT AND BEHAVIOR 297 (Paul B. Baltes ed., 1978); James W. Gentry et al., *The Role of Possessions in Creating, Maintaining, and Preserving One's Identity: Variation Over the Life Course*, 22 ADVANCES CONSUMER RES. 413 (1995). Some studies, moreover, have adduced evidence that conspicuous consumption varies by race. E.g., Chao & Schor, *supra* note 123, at 124; Kerwin Kofi Charles et al., *Conspicuous Consumption and Race* (Nat'l Bureau of Econ. Research, Working Paper No. 13392, 2007), available at <http://ssrn.com/abstract=1014340>.

186. Robert H. Frank, *The Demand for Unobservable and Other Nonpositional Goods*, 75 AM. ECON. REV. 101, 107–08 (1985); McAdams, *supra* note 13, at 5; see also Marsha L. Richins, *Valuing Things: The Public and Private Meanings of Possessions*, 21 J. CONSUMER RES. 504, 516–18 (1994) (discussing the dual nature of value in possessions as generating public and private meaning). It is worth noting that, at a certain extreme level of wealth, privacy itself can become a luxury good.

187. Cf. Fennell, *supra* note 20, at 1054–59 (discussing home ownership and status).

188. There is some evidence that among the generation raised on MySpace and Facebook, this taboo may be weakening. See Alex Williams, *Not-So-Personal Finance*, N.Y. TIMES, Apr. 27, 2008, at ST1.

too explicitly, other relevant markers of status—which, as noted, tend to be quite culturally contextual. To the extent that social mobility is fluid, possessions serve as adaptive proxies for communication.<sup>189</sup> Visible proxies thus become all the more significant, enhancing the power of the indirect signals that property can send.

Moreover, proxy signals for evaluating status, including property, can gain even more strength because in some circumstances, rather than being compelled to make social comparisons by a desire for self-evaluation or self-enhancement, individuals prefer to avoid comparison altogether. Some scholars have argued that because social comparison will almost always result in one party being perceived as inferior, which can generate negative feelings with corresponding negative social ramifications for both parties, individuals sometimes prefer to avoid making explicit social comparisons in face-to-face interactions.<sup>190</sup> This avoidance of explicit communication about status can make alternative signals that much more significant.

In short, a synthesis of theories of property and relative status must reflect the social meanings instantiated through property and the many dimensions of the practical aspects of property that can embody status. Property is not the only way in which people differentiate, but it remains a central tool that people use to define and understand themselves in relation to others.

## 2. Notes of Caution and Some Responses

Any general understanding of property and status signaling is vulnerable to critique, and it is worth acknowledging the limits of the framework outlined above. To begin, perhaps the most obvious rejoinder to the assertion that a fundamental aspect of the work of property is signaling relative status is that the assertion begs an empirical question of how significant this role is compared to the other work that property is doing in any given instance.<sup>191</sup> In response, it might be possible to rely on the strength of the intuitive claim or on the kind of armchair empiricism that undergirds so much of legal literature, although there is at least some empirical support for the ubiquity of the phenomenon. It is also possible, however, to stake a claim that is not so vulnerable: that the status-oriented aspects of property serve as a kind of gravitational force—stronger in some instances, weaker in others, but always present.

A narrower version of this critique might be that even if the gravitational pull of status applies to a few categories of property, such as the obvious

---

189. Rudmin, *supra* note 43, at 55.

190. Philip Brickman & Ronnie Janoff Bulman, *Pleasure and Pain in Social Comparison*, in *SOCIAL COMPARISON PROCESSES*, *supra* note 136, at 149, 152, 156–57.

191. There is some scholarship, moreover, that calls into question the use of possessions as status symbols. *E.g.*, Rudmin, *supra* note 43, at 55 (reviewing studies). But this work, while reminding that the symbolic nature of property is highly contextual, stands in contrast to the significant theoretical and empirical literature undergirding the idea that property is a ubiquitous status symbol. *See supra* Sections II.A–B.

status symbols on which Veblen and his descendants focused, the dynamic is not terribly relevant to the broad sweep of what constitutes property, from corporate shares to hard-rock minerals to ideas. It is true that much of the research on symbolic interaction and social comparison that is relevant to property focuses on a handful of obvious categories—clothes, cars, food, homes, and the like. These all are relatively accessible and largely consumer-oriented objects. Likewise, economists have largely focused a narrow class of essentially luxury goods.

However, the significance of property's signaling function extends beyond consumer items and luxury goods.<sup>192</sup> First, as discussed above, it has been shown empirically that many types of property beyond those kinds of goods serve this function. Indeed, commentators have noted the signaling effect of even the most seemingly generic property—money.<sup>193</sup> More important, habits of mind developed in dealing with one aspect of property can shape how individuals approach other interactions around property. Thus, how people come to internalize the comparative urge expressed through more personal property can bleed over and shape general approaches to consumption and accumulation.

Any account of property that accentuates psychological aspects of possession must acknowledge the significant amount of property that is held in ways that minimize the individual connection to property, such as ownership by entities or forms of joint ownership. While this kind of distant or disaggregated ownership complicates claims about both those who communicate through property and those who receive that communication, it does not fundamentally undermine them. Entities act through individuals and those individuals do not lose their psychological depths simply because they are acting on behalf of an organization or corporation. Accordingly, the status signaling that attends to property may be filtered in interesting ways when individuals act in collective capacities, but the communication does not cease.

As to how the competitive dynamic plays out along socioeconomic lines, it might be argued that status signaling is important for relatively higher-status individuals, but declines in significance rapidly for those for whom daily necessities—food, shelter, medical care—are a consistent challenge. This is a fair point, and there is clearly a connection between the amount of disposable income or wealth and the ability to engage in outward displays of status consumption. But as a number of commentators have observed, consumption patterns at the higher levels of socioeconomic status tend to drive consumption patterns throughout society.<sup>194</sup> The consequences of having to signal status may indeed be greater precisely for those for

---

192. As Frank has argued, status races play out in a wide variety of markets. See FRANK, *supra* note 41, at 87–108.

193. See, e.g., HENRY CLAY LINDGREN, *GREAT EXPECTATIONS: THE PSYCHOLOGY OF MONEY* 58–63 (1980).

194. See, e.g., DOUGLAS & ISHERWOOD, *supra* note 5, at 182; VEBLEN, *supra* note 17.

whom choices to consume in particular ways entail more painful tradeoffs, such as consumption for durable goods versus for health care and the like.<sup>195</sup>

A final note of caution one might sound is the question whether the comparative dynamics that play out through property are as significant today as they have been in other periods in our history. Indeed, some commentators have argued that we are in a post-materialist phase of our culture where people sort themselves less on socioeconomic grounds and more on a variety of cultural grounds.<sup>196</sup>

If anything, while material culture may be losing its primacy in defining status, it is still central and reaches through all segments of society. As Juliet Schor has argued, there is “little question that consuming is a, if not ‘the,’ realm of agency in contemporary society.”<sup>197</sup> Smith may have drawn a sharp distinction between the ability of the rich and the poor to “draw . . . the attention of the world”<sup>198</sup>—that is, to signal with property—and Veblen of course may have focused on the “leisure class.”<sup>199</sup> But modern consumer culture has democratized consumption to an extent that might have been unimaginable in Smith’s time and even perhaps Veblen’s, with the corresponding consequence that status consumption has become a much more thoroughly engrained aspect of everyone’s daily life.

It is true, moreover, that active and engaged consumption has become more of a reality than the image of the passive shopper that Madison Avenue traditionally targeted.<sup>200</sup> But even empowered consumers can still place great value on the symbolic aspects of consumption. Indeed, the costs associated with gathering and processing the information that can imbue property with status are arguably dropping, as the ready availability of once-private information continues to grow.<sup>201</sup>

It may be, as one scholar recently argued, that the emerging availability of virtual worlds could fundamentally disrupt our present patterns of consumption.<sup>202</sup> In a culture in which consumption was disassociated from materiality, status races that played out through virtual property might raise fewer normative concerns than their material counterparts. That, however, is not yet the world in which we live, and the continuing relevance of modern understandings of conspicuous consumption and status races seem far from

195. Cf. Charles et al., *supra* note 185, at 32 (finding that consumption of visible goods accounts for sixty percent of the difference in spending between whites and minorities on education, health care, food, and housing).

196. See, e.g., RONALD INGLEHART, *CULTURE SHIFT IN ADVANCED INDUSTRIAL SOCIETY* 66, 103 (1990).

197. Schor, *supra* note 97, at 24.

198. SMITH, *supra* note 88, at 71.

199. VEBLEN, *supra* note 17.

200. See Schor, *supra* note 97, at 23–24 (discussing the emergence, and limits, of “agentic” consumption).

201. One can access, for example, web sites such as <http://www.zillow.com> to get an instant estimate not only of the value of your own home, but also of the homes of all of your neighbors.

202. Albert C. Lin, *Virtual Consumption: A Second Life for Earth?*, 2008 BYU L. REV. 47, 97.

fading. This continuing relevance resonates particularly in how we conceptualize, and often valorize, the work of property.

### III. STATUS COMPARISON AS CRITIQUE IN PROPERTY THEORY

The long intellectual tradition and active contemporary scholarship on status signaling through property sheds important new light on each of the three primary discourses that shape contemporary property theory. Understanding this phenomenon, however, offers more than descriptive richness: it strongly suggests grounds for normative concern as well.

Each discourse has engendered what might be considered external critiques. Economic perspectives on incentives and allocation have been criticized, for example, for ignoring distributive justice. Privileging personhood, as Radin acknowledged, risks fetishizing property. Communitarian perspectives may unduly ignore individual autonomy. By contrast, this Article's functionalist engagement with property as a tool to signal relative status provides an internal critique for each of these discourses.

Taking each vision of property on its own terms, then, this Part argues that status signaling complicates the work of property that each vision presents. Adding this layer does not negate the undeniable insights undergirding each discourse, as status signaling can have positive and negative consequences. Acknowledging the positive, this Part focuses primarily on what is normatively troubling about how people interact with and through property as a result of status signaling, in the spirit of Joseph Singer's observation that the "most fundamental paradox of property is that we may best understand it by exploring the tensions—the contradictions—within it."<sup>203</sup>

This Part accordingly draws on the theoretical insights outlined in Part II to examine the normative consequences of status signaling for each discourse. First, to the extent that consumption demands associated with property are particularly vulnerable to cooptation in status races, property's incentive and allocative functions can systematically fail, misallocating resources and undermining the welfare-maximizing function associated with trades around property. Likewise, to the extent that property is used to signal relative status, property's importance to individual identity can be warped by aspects of identity and personhood that are too closely tied to comparison. Finally, property's propensity to signal status is both propelled by and has the potential to undermine the very social relations that are said to define property. This Part explores these insights in turn and then concludes by arguing that status signaling provides a surprising theoretical bridge linking these otherwise disparate theoretical constructs.

---

203. SINGER, ENTITLEMENT, *supra* note 66, at 205.

### A. Over-Incentivizing, Misallocation, and Status Races

For the first discourse—property as an institution to incentivize production and allocate scarce resources—incorporating an understanding of status signaling through property has the potential to undermine the welfare enhancements that economists and economically oriented legal scholars conventionally associate with a regime of strong property rights. Status signaling creates some potentially positive incentives that cannot be dismissed lightly,<sup>204</sup> but on the whole risks distorting both the incentive and the allocative function that property (with contract) is said to serve.

To begin, status races can lead to misallocation of resources because they tend to foster investment in and consumption of the kinds of observable status benefits that more property, generally speaking, can bring. The desire to have more possessions can lead to over-incentivizing productive activities—a general tendency to prefer more property, all things considered. This risks over-incentivizing property-related production and investments to satisfy inherently positional needs, given the particularly strong role that property plays in signaling status. Frank made this argument generically,<sup>205</sup> but it applies with particular strength to property as opposed to other potential choices that individuals could make in terms of development and distribution of resources. And this concern may have the greatest force for those least able to afford this trade-off.

This potential misallocation problem raises several normative concerns that parallel long-standing critiques of materialism and mass consumption.<sup>206</sup> On an individual level, these critiques highlight the psychological harms of materialist orientation<sup>207</sup> and the negative consequences that flow from defining oneself and one's priorities through material things, as opposed to experiences, relationships, spirituality, and the like.<sup>208</sup> On a societal level, status races that overly privilege property also evoke the negative environmental consequences of the consumption or ecological footprint that such incentives tend to generate.<sup>209</sup>

There is a separate, but closely related, misallocation problem that status can generate for property. Within the general category of property, status concerns can lead individuals to choose possessions that are status-related

204. See, e.g., Fremling & Posner, *supra* note 154, at 1074 ("In a dynamic society, such as that of the United States, the desire to enhance one's status is generally a spur to socially beneficial rivalry. People in a society that is open, mobile, and competitive usually cannot obtain high status without achievements, so status rivalry motivates people to work harder than they would otherwise. Unless they can appropriate the entire social product of their harder work, they confer external benefits.").

205. See *supra* text accompanying notes 157–59.

206. See generally SCHOR, *supra* note 18.

207. See, e.g., Leaf Van Boven, *Experientialism, Materialism, and the Pursuit of Happiness*, 9 REV. GEN. PSYCHOL. 132 (2005) (discussing research findings on materialism and happiness).

208. See, e.g., TIM KASSER, *THE HIGH PRICE OF MATERIALISM* 87–95 (2002).

209. See William E. Rees, *Ecological footprints and appropriated carrying capacity: what urban economics leaves out*, ENV'T. & URBANIZATION, Oct. 1992, at 121.



over possessions that are not. Thus, not only will individuals potentially over-invest in property generically speaking, but will tend to invest in status-enhancement over functionally equivalent but non-status-enhancing property.<sup>210</sup> In more accessible terms, the drive for status through property may generically cause people to seek things whose overriding purpose is simply to reinforce hierarchy.

The concern here echoes the critique of materialism, but an individual can be overly materialistic and suffer from the significant negative effects that have been shown to flow from that outlook, entirely without regard to relative position. Here, instead, the concern is that because status-related objects are valued on a relative basis, the desire for status-related objects may lead people to strive for property that lacks utility or intrinsic meaning.

A final misallocation concern associated with status arises from the need to invest resources to police both the determinants of status and the boundaries of status categories. As Goffman pointed out, because status symbols are inherently representational, communication through such symbols carries the inherent risk of fraud.<sup>211</sup> This, in turn, requires “mechanisms for restricting the opportunities that arise for misrepresentation.”<sup>212</sup> In property terms, this requires investing resources in monitoring the material trappings of status and responding to transgressions against established status boundaries. Because such resources could otherwise be invested in productive activity of various sorts, the need to shore up indeterminate status markers (often by over-investing in status-related resources) and to ensure that others are not manipulating the symbols of status alters incentive structures around property.

Indeed, status consumption may incentivize risk taking to satisfy relative preferences in a particularly socially wasteful manner. The current credit crisis, with its roots in single-family mortgages that were a stretch for many consumers,<sup>213</sup> illustrates behavior that appears irrational by standard economic metrics but that responded at least in part to incentives derived from the symbolic meaning of home ownership. That there has been not only a significant state infrastructure promoting that symbolic meaning,<sup>214</sup> but an active industry stoking this element of demand makes it no less significant a factor in individual calculations of buying versus renting.

---

210. See Marsha L. Richins & Floyd W. Rudmin, *Materialism and economic psychology*, 15 J. ECON. PSYCHOL. 217, 218 (1994).

211. Goffman, *supra* note 166, at 296.

212. *Id.*

213. See Stuart R. Berkowitz, *The Subprime Mortgage Mess—A Primer to Assist Investors*, 64 J. Mo. B. 122, 123 (2008).

214. The government, particularly the federal government, directly promotes home ownership primarily through the federal income-tax deduction for mortgage interest and property taxes. See ALEX F. SCHWARTZ, *HOUSING POLICY IN THE UNITED STATES* 69–76 (2006). But there is also a significant policy apparatus actively selling the more abstract value of home ownership. See, e.g., George W. Bush, Proclamation No. 8263, 73 Fed. Reg. 31,747 (May 29, 2008) (“For many Americans, owning a home represents freedom, independence, and the American dream. During National Homeownership Month, we highlight the benefits of owning a home and encourage our fellow citizens to be responsible homeowners.”).

The centrality of relative preferences in property also complicates the exchange side of this property discourse, adding a decided note of caution to the pragmatic workings of Coasian bargaining. As McAdams has noted, “making someone absolutely better off may itself make others worse off if the others prefer to maintain a certain economic position relative to the one whose wealth is increased.”<sup>215</sup> If people trade not just to satisfy their own needs but also to gain relative status, the mechanism of transfers is much more vulnerable to breakdown over positional strategic behaviors than its veneration in the law and economics literature would suggest.<sup>216</sup>

A final normative consequence of recognizing the role of status races through property is that the satisfaction people derive from property may be unstable and less likely to yield well-being than standard utilitarian accounts assume. In what is known as the Easterlin paradox, after the finding by economist Richard Easterlin that higher national income does not accord with higher levels of subjective well-being,<sup>217</sup> a number of studies have found that increased wealth does not translate into increased happiness.<sup>218</sup> Similarly, studies have shown that experiential purchases yield greater well-being than material purchases,<sup>219</sup> assuming a certain level of basic material sufficiency.

One aspect of the Easterlin paradox and related work on comparative hedonics is that relative position may generate more well-being than absolute material wealth. This may be because people become inured to the positive effects of a certain level of consumption and then have to consume more to achieve the same psychological reaction.<sup>220</sup> If this is fueled by comparison through property, the welfare enhancement associated with more property may not be direct, or in some circumstances even real. Thus, the move from a 1500-square-foot house to one that is 2500 square feet may not be as individually welfare enhancing as would first appear if the move brings one into contact with the 4000-square-foot house across the street.

---

215. McAdams, *supra* note 13, at 4–5 (emphasis omitted).

216. *See id.* at 15–16.

217. Richard A. Easterlin, *Does Money Buy Happiness?*, 30 PUB. INT. 3 (1973); Richard A. Easterlin, *Will raising the incomes of all increase the happiness of all?*, 27 J. ECON. BEHAV. & ORG. 35 (1995).

218. Easterlin's data have been challenged. *E.g.*, Betsey Stevenson & Justin Wolfers, *Economic Growth and Subjective Well-Being: Reassessing the Easterlin Paradox* (Aug. 25, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1121237>. But there is additional research supporting the tenuousness of the link, beyond subsistence, between absolute wealth and happiness. *See* Andrew E. Clark et al., *Relative Income, Happiness and Utility: An Explanation for the Easterlin Paradox and Other Puzzles* (June 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=998225>.

219. *E.g.*, Leaf Van Boven & Thomas Gilovich, *To Do or to Have? That Is the Question*, 85 J. PERSONALITY & SOC. PSYCHOL. 1193 (2003) (discussing research on experiential purchases versus material purchases).

220. There is a growing literature on people's adaptation to changing conditions, particularly reactions to negative events and ability to gauge accurately how positive events will change people's subjective sense of well-being. *See, e.g.*, Cass R. Sunstein, *Illusory Losses* 13–17 (AEI-Brookings Joint Ctr. for Regulatory Studies, Working Paper No. 07-07, July 2007), available at <http://ssrn.com/abstract=983810>.

When everyone starts buying bigger houses, as has happened in our country over the past fifty years, the welfare gains supposedly associated with increased consumption of property may disappear altogether.

These normative concerns raise some tension with an important, if often implicit, assumption in much of the literature on property's role in incentives and allocation, namely the utilitarian default that preferences are value neutral. Under this assumption, there should be nothing inherently normatively troubling about satisfying relative preferences—preferences for more property because more property connotes higher status or for property that connotes higher status over other kinds of property. Such preferences, the argument would go, are no less entitled to satisfaction than any other preference.

In response, it would be possible to note that the assumption of value neutrality has long been challenged and critiques about materialism and ecological harm fit comfortably within a normative tradition that does not concede that all preference satisfaction is equal. This may be true, but in some sense does not accept the largely utilitarian framework that focuses on property's role in incentives and allocation. Even within this framework, however, a number of scholars have identified the negative externalities that can flow from the satisfaction of relative preferences.<sup>221</sup> Thus, status-related preferences can generate identifiable harms (although they will not always do so), and they can also alter the work that otherwise neutral preference satisfaction through property is generally thought to achieve.

Ultimately, then, if a central aspect of the incentive rationale that undergirds this vision of property is security, the proposition that property tends to generate status races may call into question some of the unexamined justifications for the sanctity of security. What is protected through strong property rights—through “property rules,” in Calabresi and Melamed's terms—is less solid than the conventional literature assumes, as the value of that security rests to a certain degree on the shifting sands of comparison.

### *B. A Fun-House Mirror for the Looking-Glass Self: Warping Identity and Personhood*

As to the second major property discourse, the status-signaling effect of property can provide new ground to question any unalloyed veneration of property's role in identity. As with the resources that can be wasted or misallocated acquiring positional goods and policing status, the temptation to mask identity and the symbolic nature of the communication expressed through possessions changes the nature of the property-personhood link. If a central way in which property operates in the world is as a pervasive source of status signaling, then property may have as much potential to warp identity as to embody or foster it. This can invest the individual relationship with

---

221. E.g., McAdams, *supra* note 13, at 55–59 (identifying conditions under which the satisfaction of “inherently conflicting preferences” misallocates resources toward zero-sum competition and creates social waste).

the material things of the world with a potentially dysfunctional regard for other people's property.

There can, again, be a positive aspect to forming identity by regard to others, through property or by emulation of positive traits. There may be any number of grounds on which the aspirational aspects of comparison are not only motivating, as Smith pointed out, but also appropriately helpful in delineating elements of identity. But seeking to bolster a sense of self through outdoing or trying to catch up with perceived comparators through property seems particularly pernicious.<sup>222</sup> What generates meaning about possessions may be as much about external forces as the particular kind of internal forces on which Radin focused. There is something less authentic about symbolic meaning generated by cultural forces that are mass produced and depend, at core, on tying the personal-property relationship to the meaning given to objects by popular culture.

The sense of self this comparative process generates, moreover, is unstable in the sense that any personal connection formed to one's possessions will tend to require adjustment as others acquire or change their possessions. The meaning of home, of clothing, of any other resource can thus shift to the extent it is tied to the homes, clothes, or resources of others. The personhood reified through these material objects may reflect the choices of others as much as individual meaning.

In terms of justifications for legal entitlements, recognizing this dynamic can complicate the priorities that Radin outlined. Recall Radin's normative claim that attention to personhood can yield a structure of entitlements that gives greater weight, in some circumstances, to "personal" property than to "fungible" property.<sup>223</sup> This justificatory structure has been criticized for ignoring the potential personhood-reinforcing aspects of fungible property,<sup>224</sup> and for under-appreciating the role of commodification in creating the conditions through which personal attachments might form.<sup>225</sup> These critiques ultimately miss Radin's basic point that it is legitimate in structuring entitlements to recognize the importance of the investment of the self in the material world.<sup>226</sup>

It is also possible, however, that because certain kinds of property function most vigorously to reinforce status distinctions, the argument for giving a preference in law to the protection of those objects may lose some force.

222. To be clear, as with the externalities that status-related consumption and the drive for positional goods can generate, identifying the negative aspects of identity formation through property-related comparisons focuses on what is potentially harmful about the cycle. This is not an argument that the drive to compare is inherently negative.

223. See *supra* text accompanying notes 48–51.

224. E.g., Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347, 391 & n.209 (1993).

225. E.g., JEANNE LORRAINE SCHROEDER, *THE TRIUMPH OF VENUS: THE EROTICS OF THE MARKET* 66–74 (2004).

226. For an argument, however, that privileging property in legal theory on personhood grounds lacks an empirical basis, see Stern, *supra* note 52 (manuscript at 4) ("[T]here is little evidence that any possession is constitutive of personhood or necessary for human flourishing.").

Drawing the line between what is truly “personal” in a more internally generated sense and what is overly focused on invidious comparison may be quite difficult, and this is not to suggest some overly simple judicial heuristic. But possessions acquired to match the status of others or to reinforce status barriers seem to form a less compelling basis for protection.

### *C. Reinforcing Hierarchy in Property’s Communitarian Web*

Returning to our final discourse, property’s very interconnectedness may reinforce the institution’s capacity to fuel competitive consumption and warp preferences. Compared to property’s role in structuring incentives and allocating resources or its role in forming identity, understanding status signaling serves as less of a conceptual corrective for the discourse on property as social relations. What status signaling adds to this vision of property is more complex than its relationship with the other two discourses.

To begin, part of the linkages that property forms, on a practical level, involves social comparisons and detailed, closely observed personal assessments of relative status. In a society in which property actually operated in the way that the Blackstonian isolationist image suggested, as a zone of exclusion that allowed owners to shut their backs on society, there would be little of substance to the comparative dynamic.<sup>227</sup> If, instead, possessions radiate messages, and particularly messages about relative status, the social embeddedness of property can magnify those signals. Thus, the more conscious we are of the possessions of others, the more that the social linkages that property forms may serve to magnify the communication of relative positioning. It may be, then, that the more we are bound as a community through property, the more property communicates relative status.

There is an emerging empirical literature that examines so-called contagious behavior. Everything from the use of social services to criminal activity to unemployment to a large number of consumer choices to even more counterintuitive examples such as smoking cessation and weight gain has been linked to social networks.<sup>228</sup> The precise process through which social networks shape individual behavior is an as-yet-unanswered question in the research, but the transmission of norms through social comparison is at least a part of the phenomenon. Accordingly, the more property operates to link individuals, the more the strength of the social network may, in effect, increase the signal strength of the messages that property sends.

Next, with respect to the normative vision of property as social obligation, the malleability of the signals that property communicates can interact with this communitarian ideal in positive and negative ways. A mutual understanding of shared values can reinforce a collective sense of community

---

227. See *supra* note 32.

228. E.g., Nicholas A. Christakis & James H. Fowler, *The Collective Dynamics of Smoking in a Large Social Network*, 358 NEW ENG. J. MED. 2249 (2008); Nicholas A. Christakis & James H. Fowler, *The Spread of Obesity in a Large Social Network Over 32 Years*, 357 NEW ENG. J. MED. 370 (2007).

reflected through property. Indeed, a shared sense of position in status competition can be a bond against other communities, as group-identity theory in social comparison suggests.<sup>229</sup> But status signaling can also be used to reify the negative aspects of community, as people tacitly agree to strengthen the determinants of status against outsiders. This certainly seems to be a dynamic, for example, in the fractured structure of municipal government and, at an even more fine-grained level, the operation of many common-interest communities.<sup>230</sup> The common bonds of one community, then, can magnify exclusion of others.

Ultimately, these observations do not yield, as with the two other discourses, any particular grounds for questioning the prescriptive agenda that undergirds the social-relations discourse. If social-relations theories, given their breadth, have a unifying normative theme, it is that the definition of property itself represents a balance between individual and collective concerns. Theorists in this tradition have accordingly been keenly aware of the nature of power imbalances reflected in property, but none have focused particularly on status signaling as an aspect of that imbalance. Understanding property's tendency to signal status does not change the unavoidability of undertaking that balance, but it can add one ground on which individual assertions may be understood as less atomistic and inward looking. The interconnectedness of property can thus be seen as an engine that unexpectedly has the potential to accelerate the very power imbalances on which thinkers in this tradition have focused.

#### D. Status Signaling as a Theoretical Bridge

We have now seen how property's status-signaling function adds important complications to three foundational discourses in contemporary property theory, but before turning to a closer examination of the intersection between status signaling and the details of property law, one somewhat counterintuitive aspect of this discussion bears noting. In property scholarship, discourses that emphasize incentives or identity or social relations are often seen as in tension, if not mutually exclusive. Although pluralism is an important conceptual tool in contemporary property theory,<sup>231</sup> even pluralist accounts tend to privilege one or another aspect of property theory within the mosaic.<sup>232</sup>

Unpacking the connection between property and status signaling, however, provides a theoretical bridge between otherwise disparate ways of

---

229. See *supra* note 143.

230. For discussion of the role of law in instantiating these markers of status, see *infra* Part IV.

231. See Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597 (2008).

232. Although pluralist theories resist the tendency to assert normative and functional priorities, they, too, often devolve to assertions of normative or instrumental preference. See, e.g., STEPHEN R. MUNZER, A THEORY OF PROPERTY 292–316 (1990) (applying a pluralist theory of property justifications and outlining a metatheory to resolve conflicts between and within justificatory theories).

thinking about property. It adds a layer to these discourses that illustrates how individual perceptions of others' property in turn shapes the value that individuals associate with property. This dynamic thus poses similar concerns for undermining what is welfare enhancing or well-being producing or community reinforcing, depending on the relevant vocabulary, about property across a number of methodological and conceptual divides.

The dynamics that status signaling through property generates can raise similar concerns for normally disparate discourses, a point that not only underscores how deeply entrenched this particular message is but also suggests a new ground for theoretical unity. From a theoretical perspective, then, the normative concerns that can be associated with status signaling through property form a coherent narrative as well. The tendency to signal through property and the status races that result can yield overinvestment in material goods over other alternatives, yoke the individual sense of self to collective judgments about proper levels and types of ownership and consumption, and give power to the exclusionary critique of community.

This does not mean that the status-reinforcing aspects of property are more central than the functions that dominate the current literature. To highlight the status-symbolic aspects of property is not to assert a new master narrative for property theory. Nor is this to ignore the many well-theorized and documented benefits associated with the institution of property that also dominate contemporary discourse. But a more balanced view requires engagement with the role of property in marking, communicating, and policing status.

#### IV. LEVELING AS A NORMATIVE FRAME FOR PROPERTY DOCTRINE?

Moving beyond theory, a richer understanding of the role of property in signaling status also provides a lens through which to consider the ground-level operation of property law itself. Perhaps legal academics have largely failed to engage with the work that has been done on property and status signaling in other fields because of a perception that these dynamics grow more of the nature of material *resources* and less from property in the sense of legally cognizable entitlements. But rather than being orthogonal to the details of doctrine, law is intimately involved in property's status-signaling function.

As this Part explains, law at times reinforces or facilitates property's hierarchical tendencies, in intellectual property, land use, real estate, and other areas. Conversely, law at times breaks up existing hierarchies, which is a way to understand certain long-standing features of doctrine more traditionally explained in terms of market alienability, autonomy, and distributional fairness. It would be challenging to plumb the depths of each of these manifestations of hierarchical signaling in the law of property, but it is significant that a link to the symbolic aspects of status can be seen to imbue so many different areas of doctrine.

Accordingly, although there are significant reasons to be cautious about an overly robust state role in responding to what is troubling about status

racess played out through property, understanding the various doctrinal threads that reinforce that dynamic may provide a basis for invoking property law to serve collectively as a moderating tool. This Part thus explores several regulatory strategies—based in tax, information, and property law—and the potential for tempering, at least at the margins, some of what is normatively undesirable about property's role in signaling status.

### A. Property Law's Status-Reinforcing Tendencies

Property law has historically played a central role in defining status in the sense of static, rather than relative, position.<sup>233</sup> In feudal society, property and status were formally intertwined, but even as feudal categories developed into modern property law, the law continued to play a role in defining social status by restricting or disfavoring the terms of ownership on racial, gender, and other grounds.<sup>234</sup> Although this legacy continues to shape the contemporary distribution of resources and the culture of property, modern property law plays a more subtle if still pervasive role in undergirding the symbolic meaning of property. In a number of core doctrinal areas, individuals invoke law to give legal sanction to, or provide fuel to participate in, the status-symbolic aspects of property.

#### 1. Intellectual Property: Protecting the Value of Status Symbolism

Because property's status-signaling function is in part a question of the communicative nature of objects and those signals can directly influence the value of some objects, intellectual property law plays a role in giving legal protection to the status signals associated with property. Some commentators who have engaged with the link between status signaling and intellectual property have tended to focus on the question of incentives and associated market failures.<sup>235</sup> One commentator recently argued, for example, that trademark protection for products that signal status is unnecessary

---

233. See *supra* note 2.

234. E.g., MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA xv, 14–18, 185–93 (1986) (discussing the “enforced dependence” of women with respect to property in early American history); Spencer Overton, *Racial Disparities and the Political Function of Property*, 49 UCLA L. REV. 1553, 1558–59 (2002) (“[L]aws and policies that allowed confiscation of land from Native Americans and Mexican Americans, promoted enslavement of African Americans, and prohibited immigration from non-European countries triggered racial disparities in the control of resources. Policies that mandated segregation in education, employment, housing, and business exacerbated these disparities.” (footnotes omitted)).

235. Some scholars have argued that greater legal protection is needed for certain status-related goods. E.g., Anne Theodore Briggs, *Hung Out to Dry: Clothing Design Protection Pitfalls in United States Law*, 24 HASTINGS COMM. & ENT. L.J. 169, 209 (2002) (discussing European competition as a ground for protecting domestic producers of fashion goods); Joseph Cockman, Note, *Running from the Runway: Trade Dress Protection in an Age of Lifestyle Marketing*, 89 IOWA L. REV. 671 (2004) (arguing that the efforts producers invest in developing “lifestyle” goods that relate to status should merit legal protection).



for what was described as the market for status-related goods.<sup>236</sup> This aspect of trademark law was identified as legal protection for a type of information “not about the product or service, but about the person purchasing that product or service.”<sup>237</sup> Similarly, in markets for luxury goods, the existence of knockoffs (low-cost copies of status-related goods) may in fact enhance sales (and thus incentives for production), because cheap copies actually reinforce the status benefits of the original goods.<sup>238</sup>

Some scholars have argued instead that intellectual property stifles consumers’ ability to undermine the status orientation of certain goods.<sup>239</sup> For example, one scholar has argued that protecting the symbolic functions of goods through trademarks for producers of status goods and lifestyle marketers, like all legal monopolies, denies consumers the right to communicate and freely structure their identity through the unfettered use of such symbols.<sup>240</sup> Intellectual property law, the argument continues, treats the status-symbolic aspects of material goods as an explicit—if, to some, problematic—aspect of the value of the underlying object. This is particularly important in the market for luxury goods, although status-related advertising permeates far beyond that particular niche.

In a role that is at times lauded, but more often critiqued, intellectual property gives legal force to the status messages associated with important categories of goods. It is true that this applies to a relatively narrow category of goods, but the fact that law protects investments in the intentional production of status markers reinforces the cultural power of those markers.<sup>241</sup>

236. Jeffrey L. Harrison, *Trademark Law and Status Signaling: Tattoos for the Privileged*, 59 U. FLA. L. REV. 195 (2007).

237. *Id.* at 197. As Harrison argues, trademark law functions to lower consumer search costs by granting exclusive rights to identify the source of a product. *Id.* at 198. He argues that consumer confusion associated with status—which he identifies as currently protected by the Lanham Act and possibly by the Federal Trademark Dilution Act as well—is an illegitimate basis for legal protection. *Id.* at 200–04. Returning to Leibenstein’s distinction between Veblen effects and snob effects, *see supra* text accompanying notes 170–72, Harrison argues that there is no economic basis for assuming the underproduction of goods that supply a demand for wealth signaling nor for goods that depend on scarcity (although in the latter case, Harrison models one scenario in which there may be a net consumer surplus from subsidizing this scarcity). Harrison, *supra* note 236, at 210–19.

238. Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1384–85 (2005). This, to Barnett, undermines the necessity of intellectual property on incentive theories. *See id.* at 1412 (arguing that the “standard incentive thesis in the intellectual property literature” would anticipate incorrectly that the absence of legal protection for fashion goods would yield underproduction of those goods, when the empirical evidence suggests that a vigorous market for such goods exists despite extensive counterfeiting).

239. *Cf.* Katyal, *supra* note 109 (exploring the ways in which consumers and others subvert corporate control of the symbolism of property).

240. Malla Pollack, *Your Image Is My Image: When Advertising Dedicates Trademarks to the Public Domain—With an Example From the Trademark Counterfeiting Act of 1984*, 14 CARDOZO L. REV. 1391 (1993).

241. One could conceivably make a First Amendment argument that status signaling is protected speech, and thus entitled to protection from regulation. This argument seems a stretch, though, given the attenuated nature of the message and the differences between status signaling and the kinds of communication traditionally protected by First Amendment doctrine. *Cf.* John

## 2. Land Use and Real Property: The Place and Physical Form of Status

Land-use law, like intellectual property, can give legal sanction to the determinants of property-related status, although here the law may play a more structural role.<sup>242</sup> To begin with how law bolsters the status-related aspects of place and location, consider exclusionary zoning. The critique of exclusionary zoning is well rehearsed, largely focusing on concerns such as the actual segregation that exclusionary zoning fosters on socioeconomic, racial, and ethnic grounds,<sup>243</sup> as well as on the aesthetic and cultural uniformity that is said to flow from the design choices reflected in this kind of patterning.<sup>244</sup> More recently, the emphasis in the critique has shifted increasingly to focus on the environmental consequences of traditional zoning, highlighting the loss of open space and the carbon footprint associated with suburban living.<sup>245</sup>

But the structure of local land use can also be understood as an elaborate legal underpinning to the physical aspects of status signaling through real property and place. This plays out in several ways, but two primary forces related to the physical aspects of real property and to the territoriality of status stand out. First, of course, contemporary zoning privileges a pattern of uses and physical design that reinforces hierarchical cultural norms. Although the city-suburb dichotomy is breaking down,<sup>246</sup> we still tend to privilege single-family home ownership in large measure for the symbolic value it carries.<sup>247</sup>

Moreover, to the extent that location is one of the prime axes along which property can confer relative status,<sup>248</sup> patterns of land-use regulation

Greenman, *On Communication*, 106 MICH. L. REV. 1337, 1361–63 (2008) (defining communication under the law).

242. In land use and real property, however, legal sanction is not entirely limited to this structural role. As Stephanie Stern has argued, many aspects of residential real estate relate to the “self-expressive capacity” that this particular resource carries—a resource that is eminently vulnerable to symbolic manipulation. Stern, *supra* note 52 (manuscript at 23) (arguing against laws that “create a right to display a social status or income level that the owner does not necessarily possess”).

243. E.g., DAVID L. KIRP ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1995).

244. E.g., JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA’S MAN-MADE LANDSCAPE* (1993); cf. Katharine B. Silbaugh, *Women’s Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 FORDHAM L. REV. 1797 (2007) (arguing that traditional patterns of suburban land use exact a material cost on work/life balance).

245. E.g., John R. Nolon & Jessica A. Bacher, *Climate Change, Zoning and Transportation Planning: Urbanization as a Response to Carbon Loading*, 36 REAL EST. L.J. 211 (2007).

246. Richard Briffault, *Beyond City and Suburb: Thinking Regionally*, 116 YALE L.J. POCKET PART 203 (2006), <http://yalelawjournal.org/images/pdfs/91.pdf>.

247. Cf. CONSTANCE PERIN, *EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA 70–77* (1977) (describing the “American ideal of homeownership”). As many commentators have noted, the origins of American suburbia involved in no small measure a self-conscious movement to create and market status-oriented environments on a broad scale. See, e.g., ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA* (1987); KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985).

248. See *supra* text accompanying notes 177–78.

that physically set off higher-status communities from lower-status communities reinforce the symbolic aspects of these spatial relations.<sup>249</sup> Thus exclusion becomes not simply about isolation, but rather about engendering and satisfying preferences for places that stand *above* in a symbolic sense. Market participants, from sellers and brokers to the entire real estate industry, are well aware of this dynamic and have long played on visions of exclusivity as a proxy for status.<sup>250</sup>

That this is culturally contingent can be seen by comparing the symbolic aspects of suburban residential patterns with the symbolism that place carries in Europe, where proximity to urban centers carries high status and being on the periphery signals low status.<sup>251</sup> This also reinforces the significance of the symbolic aspects of location; to the extent that there is a functional underpinning to the location-status link, it is hard to see why it makes any rational sense to choose to live further and further out from centers of employment, retail, and entertainment, given the clear diminishing returns. Indeed, empirical work suggests an inverse relationship between subjective well-being and length of commute,<sup>252</sup> yet people are choosing to commute great distances to obtain the symbolic value associated with traditional suburban growth patterns.

Land-use regulation often privileges existing community members, who, after all, have voice and representation in the communities, over outsiders. This raises the cost of entry to a given status level and makes it easier for those who have achieved a given status to maintain it.<sup>253</sup> Although land-use disputes are often framed as conflicts between individual property rights and societal claims, this perspective ignores the interpersonal dynamics that can be associated with regulating land uses to preserve status: those with status become the “homevoters” who dominate local politics,<sup>254</sup> and they then invoke legal protection to reinforce the symbolic aspects of their relative position.

---

249. See PERIN, *supra* note 247, at 210–17.

250. Cf. Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 437 (2006) (“[D]evelopers will select common amenities not only on the basis of which amenities are inherently welfare-maximizing for the residents, but also on the basis of which amenities most effectively deter undesired residents from purchasing homes therein.”).

251. Manuel Castells, *European Cities, the Informational Society, and the Global Economy*, in THE CITY READER 475, 481–82 (Richard T. LeGates & Frederick Stout eds., 3d ed. 2003).

252. See, e.g., Daniel Kahneman et al., *A Survey Method for Characterizing Daily Life Experience: The Day Reconstruction Method*, 306 SCIENCE 1776 (2004) (identifying commuting as the worst single subjective daily activity); Alois Stutzer & Bruno S. Frey, *Stress That Doesn't Pay: The Commuting Paradox*, 110 SCANDINAVIAN J. ECON. 339 (2008).

253. Cf. DOUGLAS & ISHERWOOD, *supra* note 5, at 89 (“We have cast our argument about goods in terms of access to information. Those who can control that access act rationally if they seek a monopoly advantage. Their rational strategy then would be to erect barriers against entry, to consolidate control of opportunities, and to use techniques of exclusion.”).

254. WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001).

### 3. Property-Related Debt as Fuel for Status Races

As Claire Priest has persuasively argued, understanding the nature of debt facilitated through property is critical to understanding the nature of property law itself.<sup>255</sup> A critical determinant of how people are able to engage in status races through property is the contemporary democratization of mortgage law. Roughly from the New Deal through the aftermath of the savings-and-loan crisis, the home mortgage market was a relatively staid backwater, with most homeowners taking out standard thirty-year fixed mortgages and making a significant down payment.<sup>256</sup> Starting in the late 1990s, the mortgage market expanded significantly with the proliferation of once-exotic products including adjustable-rate mortgages, interest-only mortgages, and no-deposit loans.<sup>257</sup> While playing a part in briefly (but temporarily) facilitating the highest level of home ownership in American history (and playing a part likewise in the more recent global credit crisis), the availability of this expanded realm of credit fueled an arms race in home ownership that saw the size of the average American home rise materially in recent years.<sup>258</sup>

This is not simply a cultural development, but rather one aided very much by the underlying structure of mortgage law. Mortgage law—particularly the lax regulatory structure that has, at least until recently, allowed relatively unfettered borrowing largely for consumer goods that satisfy status needs—facilitates the use of debt for conspicuous consumption. The skew toward durable goods, with the emphasis in that market on long-term financing, tends to reduce savings compared to consumption.<sup>259</sup> Moreover, the availability of leverage generally induces greater spending on visible goods—the fact that property can generally be used as collateral with no practical check on the application to which that collateral can be put provides critical fuel for competitive consumption. Thus mortgage law has helped create the conditions through which status signaling has played an increasing role in property.

#### B. Status Mobility in Property Law: Ambiguities and Anxieties

If intellectual property, land use, and the structure of mortgage law all reinforce or fuel status signaling, some areas of the law present a more

255. See generally Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385 (2006).

256. Richard K. Green & Susan M. Wachter, *The American Mortgage in Historical and International Context*, J. ECON. PERSP., Fall 2005, at 93, 95.

257. Creola Johnson, *Stealing the American Dream: Can Foreclosure-Rescue Companies Circumvent New Laws Designed to Protect Homeowners From Equity Theft?*, 2007 WIS. L. REV. 649, 656.

258. FRANK, *supra* note 160, at 3 (average house built in the United States has nearly doubled in size since the 1950s); Lin, *supra* note 202, at 54 n.25 (average new-home size more than doubled from 1100 square feet in the 1950s to 2340 square feet by 2002).

259. See Rayo & Becker, *supra* note 164.

complex relationship with this phenomenon. The more that possessions signal status and hierarchy, the more the uncertainty of property rights strikes at the stability of relative status. Foregrounding status signaling thus helps to explain some of the anxiety that property conflicts create in contemporary culture, particularly at critical junctures where changes in legal structure upend relatively static status relationships.

### 1. *Rethinking Alienability* . . .

Law has not only been deployed to reinforce the determinants of status, but also to create the conditions that might foster status mobility. The central doctrinal tool traditionally associated with this mobility involves protection of alienability. In early common law, many types of property—most centrally land—had significant restrictions on alienability, and one of the signature aspects of the move away from feudalism was an abiding hostility in land law to these restrictions.<sup>260</sup> This deep theme in property law has an ambiguous relationship to status hierarchies. On the surface, and this is how the movement has traditionally been understood, alienability undermines accumulations of wealth and also the literal connection between property and power that marked land in early common law, thus undermining fixed status hierarchies. Doctrines of alienability, however, also inject a malleability to transfers around property that is less present where categories are stable. This allows people to treat land as a commodity, but also increases the pressure to preserve status and also, of course, gives fuel for further accumulation.

There are other related doctrinal veins—from the destructibility of contingent remainders to the Rule in Shelley's Case to the Rule Against Perpetuities, among others<sup>261</sup>—that mediate the amount of control those seeking to protect concentrated wealth can exercise, which in turn can undermine the stability of status. This is conventionally framed, again, as a concern with alienability—allowing current holders of property to perform exchanges that can put the property to its highest and best use despite the wishes of earlier generations.<sup>262</sup> But another way to frame the common law's long-standing hostility to “dead-hand control” and other aspects of dynastic control is to reframe that hostility as also concerned with creating a level playing field in which status connected with property is fluid.<sup>263</sup>

---

260. See DUKEMINIER ET AL., *supra* note 77, at 195.

261. *Id.* at 240–51 (discussing common-law rules that resist dead-hand control over assets).

262. *E.g., id.*

263. Battles over gentrification present another example of where alienability and the structure of entitlements disrupts established patterns of status relations, generally displacing relatively lower-status residents with relatively higher-status residents. Thus part of the anxiety suffered by displaced residents in gentrifying neighborhoods may have something to do with a consciousness of this particular kind of status-related displacement. That certainly seems to underscore some of the more heated rhetoric that abounds in these conflicts.

Ultimately, a key rationale in property law has always been stability,<sup>264</sup> but there is a corresponding hostility to stability which troubles a number of property theorists. If stability is linked to embedded hierarchy, this hostility takes on a more positive cast: law can undermine the absolute nature of property in order to temper the downsides of property's tendency to reify status.

## 2. . . . And Inalienability

Just as increasing alienability can be both a tool to break up fixed status and to create new status hierarchies through property, inalienability—placing certain potential objects of property outside the realm of commerce—holds a similar double salience to status signaling.<sup>265</sup> On one hand, inalienability can be a tool to reinforce status. Anthropologists have noted that placing commodities outside of the channels of commerce is a common strategy that high-status groups employ to police their status boundaries.<sup>266</sup> Similarly, in our culture, certain goods are made artificially scarce in order to reinforce the high-status associations with those goods. A similar dynamic plays out around many resources that we allow private parties to exclude others from, such as club memberships and New York co-ops, among many others. Simply refusing to sell—making a decision to render a good inalienable—can reinforce the symbolic power of that good and in turn the status its owner has.

On the other hand, it is possible to reinterpret some of the core distributional concerns that drive inalienability to see that preventing consumption of a good may short-circuit a status race played out through that good. Thus, in contemplating what would be objectionable about a market in, for example, babies or body parts, the fact that people in our culture might inevitably tend to appropriate them into conspicuous consumption is particularly troubling. Inalienability in those contexts can be understood as a deliberate, and appropriate, social choice to prevent status conflicts mediated through certain potential objects of property that would have especially harmful consequences.

---

264. BENTHAM, *supra* note 27, at 111–12 (describing property as “established expectation”); Bell & Parchomovsky, *supra* note 28 (proposing a theory of property grounded in “stable ownership”).

265. The literature on inalienability in legal scholarship has focused on concerns of efficiency (reducing externalities associated with allowing certain kinds of transactions), distributional equity, and moral qualms about debasing the objects of property, among others. See Calabresi & Melamed, *supra* note 37, at 1111–15; Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. (forthcoming Mar. 2009) (manuscript at 7–9, on file with author); Radin, *supra* note 51.

266. DOUGLAS & ISHERWOOD, *supra* note 5, at 140 (“Refusal to transact is such a common, if not worldwide, strategy of exclusion that we have been able to base a cross-cultural meaning for the notion of consumption.”).

### 3. Susette Kelo's Anxiety: Eminent Domain and the Loss of Relative Status

When the Supreme Court upheld the condemnation of the homes of Susette Kelo and others for a redevelopment project in the small Fort Trumbull neighborhood of New London, Connecticut,<sup>267</sup> the scholarly response highlighted the possible inadequacy of compensation for property so closely tied to the homeowners' identity. The traditional measure of compensation for eminent domain has always been the fair market value of the property, but as a number of scholars have noted, that measure ignores the subjective value of the property, not to mention the value of the property as part of an assembled block of parcels, or the value of autonomy over decisions about property.<sup>268</sup>

One explanation for the tenacity of some opponents to the redevelopment plan that has not gotten attention might be that dispossession risks (and often results in) not simply the loss of the personal attachment that has accrued to property—to the home—but also relocation to a place of relatively lower (or at least less certain) status.<sup>269</sup> In this sense, place is not fungible, even if home and community can be reestablished in some other context.

This status anxiety can be seen at the margins of several other landmark eminent domain cases. Part of the outrage that the plaintiffs in *Berman v. Parker* expressed seems to have been over the fact that their businesses were viable and relatively prosperous in communities that were, by all accounts, deeply challenged.<sup>270</sup> In *Hawaii Housing Authority v. Midkiff*, one senses anxiety over loss of status in the resistance to Hawaii's program of explicit redistribution of titles—redistribution that was directed in no small measure to breaking up a land oligarchy that evinced aspects of status preservation.<sup>271</sup> Contemporary takings theory has ignored this aspect of both the regulatory goals of eminent domain and, conversely, the harm caused by loss of status, but it is manifest nonetheless.

---

267. Kelo v. City of New London, 545 U.S. 469 (2005).

268. E.g., Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 962–67; see also Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMP. LEGAL STUD. 713 (2008) (offering experimental data on subjective valuation).

269. Cf. David A. Dana, *Exclusionary Eminent Domain* (Northwestern Law & Econ. Research, Working Paper No. 08-06, May 6, 2008), available at <http://ssrn.com/abstract=1129839> (exploring situations in which low-income residents displaced by eminent domain are unable to relocate in their former neighborhoods and arguing that eminent domain undercompensates in that situation, because an element of what condemnees value is their particular place).

270. *Berman v. Parker*, 348 U.S. 26 (1954). This case involved a challenge by two business owners to the District of Columbia's urban renewal program predicated on the argument that although the area of the District being condemned had many dilapidated structures, the challengers' business was "not slum housing." *Id.* at 31.

271. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (involving a Public Use Clause challenge to the Hawaii Land Reform Act of 1967, which allowed the transfer of title from lessors to lessees).

#### 4. Status Ambiguity in Other Doctrinal Contexts

A similar ambiguity over the connection between the security of property rights and relative status can be found in several other doctrinal contexts, and will be mentioned briefly.

##### a. *Adverse Possession and the Double-Edged Sword of Dispossession*

The deep (and still active) conflicts that swirl around the ability of an unlawful possessor to obtain title from an owner through adverse possession can undermine the fixedness of physical possession for land and other property. This, in turn, can challenge the status associated with certain kinds of property, with absentee landlords less able, on some accounts, to horde property unproductively. Conversely, in some contexts, adverse possession can give legal sanction to those shut out of traditional property arrangements. Some urban squatters, for example, are not only seeking shelter, but also can be understood to be protesting the combination of absentee landlords and speculation that left significant abandoned property.<sup>272</sup> When squatters occupy abandoned property, they send a signal about the consequences of abandonment. They also send a signal, moreover, about empowerment and the instability of fixed categories<sup>273</sup>—a bottom-up message about dissatisfaction with relative status expressed through property.

##### b. *The Landlord-Tenant Revolution Revisited*

Landlord-tenant relations typically present a classic interaction between relatively high-status individuals (or entities) and low-status individuals. The landlord-tenant “revolution” of the 1960s and 1970s centered around changes that shifted power traditionally held in that relationship from landlords to tenants.<sup>274</sup> As with other significant doctrinal shifts, it is possible to discern an element of status anxiety in responses to the landlord-tenant revolution. Landlords are hardly a homogenous group, and assimilating someone who rents out, say, an in-law suite in their basement with commercial landlords who own significant portfolios of units on a national scale must be done with caution. However, some of the reaction to the doctrinal shifts empowering tenants can be seen to have destabilized the power balance between landlords and tenants, at least in some contexts. These doctrinal shifts changed some of the cultural significance of renting, although there is

---

272. See Eduardo Moises Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1122–26 (2007).

273. See *id.* at 1132 (“[T]he centrality of property to the satisfaction of fundamental human needs . . . creates a strong impetus for those excluded from participation in the system of ownership to challenge both existing property rules and established property entitlements.”).

274. Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984).



still significant resonance to owning over renting that transcends the economics of the decision.<sup>275</sup>

### *c. The Double Messages of Common-Interest Communities*

Finally, the contemporary rise of common-interest communities is another example of the ambiguities of status playing out in legal structure. The majority of new residential development in the United States now comes in some form of cooperative, condominium, covenant-control community, or the like, engendering a significant scholarly backlash.<sup>276</sup> A central ground on which these communities are criticized—rigid adherence to community norms, often about the external appearance of individual properties—sends a signal to the larger world at the same that it tempers status races within the community. Uniformly manicured homeowners-association-dominated neighborhoods say something very clear both to residents (about their own status and about the need to limit status races) and to outsiders (about the status of insiders). And this dual function is given legal force through covenants and other mechanisms enforceable by insiders and practically difficult for dissenters and outsiders to challenge.

Each of these areas of law represents either an ongoing challenge to certain status associated with property, as with absentee ownership; shifts in the meaning associated with certain legal categories, as with the landlord-tenant revolution's implications for the nature of being a landlord; or a complex double message reinforcing and to some extent checking status, as with the structure of many common-interest communities.

### *C. Tempering Influences: Taxation, Information, and Property Law as Comparative Regulatory Strategies*

Recognizing that law both reinforces and undermines property's hierarchical signaling underscores the intimate involvement of the state in what might at a remove seem a private dynamic. This state involvement is as contingent as any other area of the law, and thus ripe for refinement.<sup>277</sup> Property

275. For discussion of the deep and varied symbolism of this tenure choice, see PERIN, *supra* note 247, at 32–80.

276. See DUKEMINIER ET AL., *supra* note 77, at 817 (collecting sources).

277. To choose to focus on the state role in status signaling is not to suggest lack of interest in the reality of material inequality or to argue that is it not vitally important for scholars to continue to explore that inequality. Rather, it is to suggest that that field is well occupied, both in the legal academy and beyond, and that what has been missing from the discourse at least in the legal literature is more focused examination of the symbolic overlay.

One critique of this analysis could certainly be that isolating specific doctrinal examples risks obscuring the larger tendency of the basic system of private property to generate and reinforce inequality. Accordingly, one reaction to the link between status and property, *pace* Marx, would be to restructure radically the nature of private property. Eliminating underlying material inequality would hardly eliminate people's tendency to sort hierarchically and to signal that sorting, but there is no doubt that it would have some effect on current dynamics around property and status signaling. For such an argument, see PAUL A. BARAN & PAUL M. SWEEZY, *MONOPOLY CAPITAL: AN ESSAY ON THE AMERICAN ECONOMIC AND SOCIAL ORDER* (1966), *cited in* Jim Peach & William M. Dugger,

law has a role to play—however cautiously—in tempering what can be pernicious about status races around property. This Section accordingly explores three potential approaches to a regulatory role. The first approach would essentially reduce the fuel for status races, as with luxury or consumption taxes. The second, an informational approach, would regulate the signal itself. The third, and perhaps most promising, would look to property law to serve as a kind of firebreak—a coordination tool to check status spirals inspired by property.

To begin, common policy prescriptions for responding to the consequences of hierarchical signaling have largely focused on tax policy.<sup>278</sup> Thus, for economists and economically oriented legal scholars, the primary tool to respond to problems of dead-weight loss and over-incentivizing other-related preference satisfaction is a consumption or “luxury” tax.<sup>279</sup> As applied to property more generally, this strategy would seek to undermine status races by reducing the resources available through which to engage in such races or by penalizing investments in specific status goods.

Taxation as a solution, however, raises a host of practical problems, particularly to do with measuring the “harm” that positional concerns might inflict and then tracing that harm to particular individuals.<sup>280</sup> Moreover, tax-based strategies to temper the property-status link are arguably misdirected. Merely taxing the inputs to status races does little to disrupt the dynamics that generate them and could, under certain circumstances, even reinforce the status aspects of certain kinds of possessions, given that high price can be one reason that goods convey status.<sup>281</sup>

A second regulatory strategy would target the communicational aspects of status signaling through property. One way to think about the negative consequences of this phenomenon is as a kind of information failure.<sup>282</sup> On

---

*An Intellectual History of Abundance*, 40 J. ECON. ISSUES 693, 698 (2006). However, beyond the infeasibility of such restructuring, and setting aside the libertarian objection, see ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 244–46 (1974), there are many reasons to believe that the negative consequences that seem inevitable with change of that magnitude are enough to take the option off the table for serious consideration. Accordingly, this Section proceeds with the assumption that any changes in law or society that might evince sensitivity to the negative consequences of status signaling through property are going to be incremental and, perhaps, marginal in nature. That is not to undermine their potential significance, but rather to place any such changes in appropriate context.

278. E.g., McAdams, *supra* note 13, at 74 (proposing taxation of status goods as a preferable strategy over prohibition of status consumption).

279. E.g., MILL, *supra* note 91, at 869 (proposing a “tax on luxuries” that would target what “is expended on indulgences” that flow from seeking to satisfy the “opinion” of others); see also Thomas D. Griffith, *Progressive Taxation and Happiness*, 45 B.C. L. REV. 1363, 1384–88, 1395–97 (2004) (discussing progressive taxation as a tool to reduce the negative externalities associated with positional goods).

280. See Michael E. DeBow & Dwight R. Lee, *Happiness and Public Policy: A Partial Dissent (or, Why a Department of Homeland Happiness Would be a Bad Idea)*, 22 J.L. & POL. 283, 289–90 (2006).

281. See *supra* note 169. Frank has proposed a progressive consumption tax, which he argues solves the problems associated with taxes on expenditures. FRANK, *supra* note 160, at 211–23. Even a consumption tax, however, risks merely reallocating incentives toward other status goods.

282. I am grateful to Lee Fennell for suggesting informational responses to the problems associated with status signaling through property.

some level, people may choose to invest in certain goods over others (or in property generically) because of misimpressions that such investment may create. Over-leveraged homes and faux luxury goods can be understood to convey inaccurate information, gaming the property signal.

If the problem is information failure, a solution might involve clarifying the signal that property sends, on the theory that a more accurate message might do less to trigger competitive consumption and related concerns. Thus, for example, if people knew that their next-door neighbors were over-leveraged in adding the 1000-square-foot addition, they might not feel quite so compelled to keep up. Lior Strahilevitz has recounted what he calls the reputation revolution, in which a vast amount of previously unavailable information about strangers has become a routine part of much daily interaction.<sup>283</sup> Thus the technology and social tools exist to peer behind the status curtain and learn a great deal about the conditions underlying the surface-level messages that property sends. This suggests that one way to solve, or at least mitigate, the cascades that come from at least the false signals that attend to status would be to force more information into the system.

There are significant challenges here as well, not the least of which arise from privacy concerns. Indeed, there is a risk that more information might simply provide additional grounds on which to make social comparisons—that this might be an arena where more accurate information about the material basis for inequality would reinforce the symbolic aspects of the status associated with that inequality. Thus, if people knew more about each other's income, debt levels, the square footage of their homes, and the like, they might be inclined to care even more about comparisons.

This suggests, perhaps counterintuitively, that mandating *less* information might be a more productive approach.<sup>284</sup> As a practical matter, however, it is the very visible nature of much property that makes it such a potent symbol for status.<sup>285</sup> Efforts to directly tamp down the symbolic qualities of property as a self-conscious regulatory effort to raise information costs associated with the communication of relative status seem most likely to lead to shifts to other types of signals.

There may be an intermediate state role as a norm entrepreneur in modifying the signals associated with certain types of property. If certain types of property carry status for their relative size or far-flung location, they can just as well carry status for, say, being carbon neutral or, as in Europe, being close to the center of urban life. The symbolic meaning of property is hardly fixed.

There is reason, however, to believe that the state would tend to be a particularly clumsy symbolic regulator when it comes to status, given the

---

283. Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 Nw. U. L. Rev. 1667 (2008).

284. Cf. Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 789 (1998) (discussing law as a way to increase or decrease the cost of signaling).

285. See *supra* text accompanying notes 188–90.

complexity and social embeddedness of signals associated with status. Were it as simple as more property equals more status, which may be true in the aggregate, then a consumption tax or similar solution would be the easiest approach. But because the symbolic connection is more complex, fine-grained adjustments would be required if the symbolic link were to be attacked directly.

Contrary to either what might be described as the Millian instinct to tax the sources of status differentiation or targeting the channels of communication around property as an information strategy, it might be possible to consider the structure of entitlements in property law as a third strategy. There would be two elements to this approach. First, legal rules that disrupt settled patterns of status may have greater merit than legal rules that tend to ossify existing patterns of status. As discussed above, there are a number of doctrinal areas where property rules facilitate status mobility, and while mobility will not alter the basic reality of status competition and status anxiety, it can help create a more level playing field. There are elements of direct redistribution that are important to this, but redistribution can also dovetail with entitlement structures that ensure that law is not invoked to reify status.

Second, property law can more explicitly serve as what Frank described in another context as a form of “collective protection of inconspicuous consumption.”<sup>286</sup> Frank pointed to a variety of policy mechanisms—from collective bargaining agreements to worker-safety regulation and others—that represent collective choices to privilege goods (in the economics sense) that do not generate the kind of status associated with conspicuous consumption.<sup>287</sup> Property law has potential to serve in the same capacity. Thus, land-use policies that foster economic integration, common-interest community structures that reduce visible status competition, intellectual property rules that give greater recognition to empowered cultural consumers, and others can provide public and private legal mechanisms to overcome the collective-action problems that lead people to jockey for relative position through property when it would be in their collective best interest to agree to more normatively attractive alternatives.<sup>288</sup>

One must be cautious about the limits of state intervention here, and the ample history of sumptuary laws simply redirecting conspicuous consumption to other goods suggests that any change here would have to be marginal.<sup>289</sup> Tamping down people’s ability to strive for status through

---

286. FRANK, *supra* note 41, at 154–61.

287. *Id.* at 161–69.

288. This could also lead to a focus on the tangible aspects of status races through property. Some communities, for example, have begun to regulate disproportionate home sizes and renovations that take houses out of neighborhood context, *see, e.g.*, Jessica Garrison & Cara Mia DiMassa, *Rules Limit Home Size, Hotel Conversion in L.A.*, L.A. TIMES, May 7, 2008, at 1, and similar strategies are conceivable. This is a very direct way in which the visual impact of property can be regulated to moderate the status signals that property sends.

289. FRANK, *supra* note 160, at 199–200 (discussing historical laws restricting luxury-related expenditures and the tendency of such laws to generate “evasive” actions generally as costly as the avoided consumption).

property risks leading people to seek status in other ways. Some alternatives might be normatively desirable—competing, say, to be better parents or friends, or to produce great art or science<sup>290</sup>—but some might yield results that are even more troubling than the consequences of status races through property. Certainly historically, one primary advantage of status through property was its democratizing potential—representing a break with decidedly less fluid markers such as birth or race, even if conventional assumptions about class mobility remain unrealistic.<sup>291</sup>

The point, however, is not to overhaul the legal system, but rather to recognize the possibilities of nudging legal change toward a more organic and less status-influenced position. In each of these arenas, the point should not be to radically revise the doctrine to eliminate what might be troubling about status signaling through property, a project that would have to recognize the impracticality of the endeavor and the intractability of the dynamic. Rather, the point should be to understand that as the law develops, a sensitivity to the risk of status races can play a part in structuring entitlements as well as in the fine-grained application of a variety of property-related doctrines.

## CONCLUSION

Every Gilded Age produces its own reflexive iconography, anxieties, and social responses, and our recent, though now fading, one has been no different. Veblen's scathing insights about conspicuous consumption captured something essential about the first Gilded Age over a century ago, and concerns that arise from property's role in signaling status likewise take on particular urgency in the era of rising inequality we are now experiencing.<sup>292</sup>

It may be that as our culture becomes more centered around information and virtual realms, it will break free of the long-predominant link between material culture and status. We may be making a transition from the world of riches on parade described by Smith and Veblen to a more egalitarian culture of social networking and empowered consumption. And the more our identities can be constituted and projected through relatively inexpensive and more accessible modes of expression, the more the pressure to

---

290. See DE BOTTON, *supra* note 19, at 303 (discussing currents in philosophy, art, politics, religion, and bohemia that although not seeking to eliminate status hierarchy, have nonetheless sought "to institute new kinds of hierarchy based on sets of values unrecognized by, and critical of, those of the majority").

291. See Emily Beller & Michael Hout, *Intergenerational Social Mobility: The United States in Comparative Perspective*, FUTURE OF CHILDREN, Fall 2006, at 19.

292. Our current level of income inequality has not been seen since the end of the Roaring Twenties—1928, the eve of the Great Depression, to be precise. Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 Q.J. ECON. 1 (2003); Larry M. Bartels, *Inequalities*, N.Y. TIMES, Apr. 27, 2008, at MM22 ("The past three decades have seen a momentous shift: The rich became vastly richer while working-class wages stagnated. Economists say that 80 percent of net income gains since 1980 went to people in the top 1 percent of the income distribution, boosting their share of total income to levels unseen since before the Great Depression.").

compete through the accumulation and display of property may recede. Still, the inexorable tug of the material world continues. Indeed, if anything, in our “virtual age, the sorcery of the physical has intensified.”<sup>293</sup>

In the end, this Article has sought to isolate and explain property’s ubiquitous tendency to be used to communicate relative status as well as to explore how this phenomenon intersects with property theory and property law. The manifestation of property rights in actual objects—a specific house in a specific neighborhood; a given make and model of car; a first edition of a cherished book—continues to influence what the law does and means, no matter how sophisticated an understanding of property rights as jural relationships we achieve or how ethereal the objects of property law become. The urge to compare and to do so through our possessions is deep and abiding, but perhaps not entirely ineluctable. Understanding this aspect of what property does on the ground provides an important window to consider the ways in which the law reinforces this hierarchical tendency and, perhaps, how the structure of entitlements can be reconceived to temper it.

---

293. AKIKO BUSCH, *THE UNCOMMON LIFE OF COMMON OBJECTS* 15 (2005).

